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Supreme Court of the United States

PROGRESS ENERGY, INC.,

Petitioner,

v.

BARBARA TAYLOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding, in conflict with the Fifth Circuit and the formal position of the U.S. Department of Labor, that a Department of Labor regulation, 29 C.F.R. 825.220(d), unambiguously and validly precludes the private settlement or release of claims under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*

CORPORATE DISCLOSURE STATEMENT

Petitioner Progress Energy, Inc. has no parent corporations, and no publicly held company owns 10% or more of its stock.

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In the Supreme Court of the United States

No. 07-___

PROGRESS ENERGY, INC., PETITIONER

v.

BARBARA TAYLOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Progress Energy, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on rehearing (App., *infra*, 1a-20a) is reported at 493 F.3d 454. The original opinion of the court of appeals (App., *infra*, 21a-44a) is reported at 415 F.3d 364. The order of the district court (App., *infra*, 45a-65a) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 3, 2007. The court denied rehearing on August 24, 2007 (App, *infra*, 66a-67a). This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The relevant statutory and regulatory provisions are reproduced at App., *infra*, 70a-91a.

STATEMENT

Respondent sued petitioner, her former employer, for alleged violations of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, notwithstanding her prior release of those same claims as part of a severance agreement. After twice reviewing the question, a divided panel of the Fourth Circuit held that a Department of Labor regulation forbids the private settlement or release of FMLA claims. In so holding, the court of appeals rejected a contrary decision of the Fifth Circuit and the Department of Labor's official interpretation of its own regulation.

The court of appeals' ruling not only creates a conflict in the circuits and displaces an established agency position, but also calls into question the validity of countless similar waivers adopted by employers and employees within the Fourth Circuit and elsewhere. In addition, the court's decision directs federal courts and the Department of Labor to devise and implement procedures and legal standards for approving any waiver or settlement of an FMLA claim without any statutory or judicial guidance for that task. The decision thus threatens to impose new and significant burdens on the judiciary and the federal government that cannot be alleviated absent review by this Court.

1. The FMLA gives eligible employees a statutory right to take up to twelve weeks of unpaid leave annually due to personal illness or the need to care for a parent, child, spouse, or other immediate family member with a serious health condition. 29 U.S.C. 2612. Among other things, the FMLA protects employees' positions and benefits during the period of

leave and generally gives employees a right to reinstatement or equivalent employment upon their return to work. 29 U.S.C. 2614. Section 2615 makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" by the FMLA. 29 U.S.C. 2615.

Congress charged the Secretary of Labor with investigating alleged violations of the FMLA and with bringing actions to enforce the statute's provisions. 29 U.S.C. 2616, 2617. Congress further vested the Secretary with authority to "prescribe such regulations as are necessary to carry out" the Act. 29 U.S.C. 2654. Pursuant to that authority, the Secretary of Labor promulgated a regulation to implement Section 2615's prohibition on employers' interference with employees' exercise of their rights under the FMLA. The regulation provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. 825.220(d).[1]

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[1] Subsection (d) of the regulation reads, in full:

> Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (see § 825.702(d)). In such a circumstance the employee's right to restoration to the

2. Respondent Barbara Taylor is a former employee of Carolina Power and Light Company (CP&L), which is a subsidiary of petitioner, Progress Energy, Inc. According to the allegations of the complaint, which have been accepted solely for purposes of the district court's summary judgment decision, App., *infra*, 22a-23a, 53a, Taylor was employed as a data management assistant by CP&L. In 2000, she underwent extensive medical tests and procedures to evaluate swelling in her leg. She alleges both that CP&L failed to properly credit all of her leave as FMLA leave, and that she received poor performance evaluations over the course of her illness because of her health-related absences. *Id.* at 23a-25a, 46a-47a. Taylor's requests that CP&L correct her performance evaluations based on her alleged entitlement to FMLA leave allegedly were denied by the company. *Id.* at 24a-25a.

In 2001, CP&L underwent a reduction in force and laid off a number of employees, including Taylor. App., *infra*, 48a. As part of that reduction, CP&L offered Taylor various benefits, including seven weeks of paid administrative leave and monetary compensation, in exchange for executing a general release and severance agreement that encompassed any FMLA claims. *Id.* at 25a. Taylor agreed and, in exchange for $11,718 in extra compensation, released CP&L

> same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."

29 C.F.R. 825.220(d).

and Progress Energy "from *all* claims and waive[d] *all* rights" she had arising from her employment under any "federal, state or local law." *Id.* at 25a-26a, 50a-52a.[2]

3. Two years after signing the release, Taylor filed suit against Progress Energy asserting violations of the FMLA. The district court granted summary judgment for Progress Energy. App., *infra*, 45a-65a. Adopting the reasoning of the Fifth Circuit in *Faris* v. *Williams WPC-I, Inc.*, 332 F.3d 316 (2003), the district court held that the relevant Department of Labor regulation, 29 C.F.R. 825.220(d), prohibits only the prospective "bargaining away" of FMLA rights, App., *infra*, 59a, and thus allows the knowing and voluntary release of claims asserting past violations of the FMLA, *ibid.* The court stressed that "serious issues of judicial economy would be raised if" the regulation were read to "eviscerate the ability of parties to settle any FMLA disputes." *Id.* at 61a; see *ibid.* ("[I]t would appear that the only way any FMLA claim could ever be settled would be for the plaintiff to file suit and for the parties to induce the court to sign a consent judgment.").[3]

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[2] The severance documents afforded respondent 45 days to review the terms of the agreement and encouraged respondent to seek the advice of counsel before signing. App., *infra*, 51a, 63a.

[3] The district court also rejected Taylor's argument that her waiver was not knowing and voluntary, concluding that she had failed to produce any evidence creating a genuine issue of material fact on that question. App., *infra*, 62a-63a.

4. The court of appeals reversed. App., *infra*, 1a-20a, 21a-44a. The court issued two opinions, both of which concluded that the Department of Labor's regulation forbids the settlement of FMLA claims without the prior approval of either the Department or a court.

a. In its initial opinion, App., *infra*, 21a-44a, the Fourth Circuit held that the Department of Labor's regulation "prohibits both the prospective and retrospective waiver of any FMLA right (whether substantive or proscriptive) unless the waiver has the prior approval of the [Department of Labor] or a court." *Id.* at 31a. The court considered its decision to be compelled by the regulation's plain language and what, in the court's view, the Department of Labor had "said it intended the provision to mean" in adopting the regulation. *Id.* at 33a. The court further stated that the Department of Labor had "recogni[zed] that the FMLA's enforcement scheme is meant to parallel the [Fair Labor Standards Act]," under which rights "cannot be waived or settled without prior [Department of Labor] or court approval." *Id.* at 34a. Finally, the court held that, in light of congressional "silence on the question of waiver" of FMLA rights, *id.* at 39a, the regulation is "based on a 'permissible construction' of the FMLA," *id.* at 43a (citing *Chevron USA Inc.* v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).

b. Progress Energy filed a petition for rehearing en banc, and the Department of Labor filed a brief as *amicus curiae* in support of Progress Energy's petition. The Department explained that the court had misunderstood its regulation, which the Department interprets to permit the type of retrospective

settlement or waiver of FMLA claims made by Taylor here. See DOL C.A. Amicus Br. 1-15.

The court of appeals granted panel rehearing, App., *infra*, 68a-69a, and, by a divided vote, reinstated its prior holding, *id.* at 1a-20a.

The majority acknowledged that its holding conflicts with the Department of Labor's interpretation of its own regulation, but concluded that the Department's position was "inconsistent with the regulation" and thus was not entitled to deference. App., *infra*, 4a. In the majority's view, "the plain language" of the regulation "precludes both the prospective and retrospective waiver of all FMLA rights, including the right of action (or claim) for a past violation of the Act." *Id.* at 3a. Accordingly, the majority held that the regulation's "prohibition on the waiver of rights includes a prohibition on the waiver of claims." *Id.* at 6a. The court added that the waiver or settlement of FMLA claims would be permitted only if the waiver or settlement were separately approved by a court or by the Department. *Id.* at 17a.

In so holding, the majority refused to defer to the Department's position in light of what it perceived to be inconsistencies between the agency's interpretation and the regulatory history. App., *infra*, 13a-16a. The majority also concluded that permitting the private resolution of FMLA claims would "undermine Congress's objective of imposing uniform minimum standards," analogizing the Department's regulation to a statutory restriction on the settlement of certain claims under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* App., *infra*, 11a.

With respect to the burden imposed by the court's requirement of prior Department or court approval of

every private resolution or release of any FMLA claim, the court expressed "confiden[ce] that both the DOL and the courts will work diligently to deal with these cases in a prompt and efficient manner." App., *infra*, 16a.

c. Judge Duncan dissented. App., *infra*, 17a-20a. In her view, the majority should have deferred to the Department of Labor's construction of its own regulation because the majority's position was not "compelled by the language of the regulation." *Id.* at 19a. She noted that "[t]here are few words in the legal lexicon more ubiquitous and freighted than the term 'right,'" and reasoned that "the elasticity of the term 'right'" made it ambiguous whether the phrase "'right under FMLA' on its face subsumes accrued causes of action." *Ibid.* She thus would have deferred to the Department of Labor's interpretation of its own regulation. *Id.* at 19a-20a (citing *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339 (2007)).

REASONS FOR GRANTING THE PETITION

As the court of appeals itself acknowledged, its decision squarely conflicts with the Fifth Circuit's contrary holding that the Department of Labor's regulation permits the retrospective release of FMLA claims. The Fourth Circuit's decision also rejects the Department's longstanding interpretation of its own regulation. At the same time, the court's decision saddles that Department and the federal courts with a new, judicially minted obligation to superintend potentially tens of thousands of private releases and settlements in FMLA cases each year – a duty that has no footing in the statutory or regulatory text, history, or precedent. The court of appeals' construction

of that broad impediment to private settlements and releases also contradicts precedent from this Court enforcing the strong public policy in favor of the private resolution of claims. The court's decision has called into question the viability of private settlements of FMLA claims within the five States composing the Fourth Circuit, and it has introduced substantial uncertainty nationwide regarding the ability of employers and employees to reach voluntary, peaceful, and secure closure in employment relationships. Only this Court can restore uniformity to the law and stability to the business environment by correcting the court of appeals' repudiation of the widespread and beneficial practice of privately resolving FMLA claims – a practice specifically endorsed by the agency that Congress charged with administering the FMLA.

I. The Courts Of Appeals Are Divided Over The Proper Application Of A Federal Regulation That Applies To Employers Nationwide

There is a significant and recurring disagreement among the federal courts over whether a Department of Labor regulation forbids the retrospective release of FMLA claims arising out of disputes over past employment practices. As relevant here, the regulation provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. 825.220(d). As one court explained, "[a]lthough the pertinent [regulatory] language is only fourteen words in length, courts have spent thousands in trying to settle on its meaning," and "the result has been a lack of consensus among the federal courts as to the correct interpretation of

Section 825.220(d)." *Dougherty* v. *TEVA Pharms. USA, Inc.*, Civ. No. 05-2336, 2007 WL 1165068 (E.D. Pa. Apr. 9, 2007) (permitting waiver).

The court of appeals' decision in this case squarely and expressly conflicts with the holding of the Fifth Circuit in *Faris* v. *Williams WPC-I, Inc.*, 332 F.3d 316 (2003), that the same Department of Labor regulation permits the release of FMLA claims. The employer in *Faris* provided a terminated employee with compensation in exchange for a release of any federal-law claims arising out of the employment relationship. *Id.* at 318. After accepting the additional compensation and signing the waiver, the employee nevertheless sued the employer under the FMLA. *Ibid.*

The Fifth Circuit held that the release barred the employee's lawsuit. *Faris*, 332 F.3d at 322. Reading the regulation as a whole and in light of the "public policy favoring the enforcement of waivers," the Fifth Circuit concluded that the regulation is most naturally read to "prohibit[] [the] prospective waiver of rights, not the post-dispute settlement of claims." *Id.* at 321. The court further noted that its reading was consistent with case law permitting similar waivers under analogous statutes regulating the employment relationship, such as Title VII, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* See 332 F.3d at 321. The court of appeals could conceive "of no good reason * * * why the government would proscribe waiver for FMLA * * * claims and yet favor waiver of claims for age discrimination under ADEA and for civil rights under title VII." *Id.* at 322. In the Fifth Circuit's view, if the Secretary of Labor had intended "such a

departure from the policy employed in analogous areas, one would expect the Secretary would have manifested this intent forthrightly." *Ibid.*

There is no dispute that the decisions of the Fourth and Fifth Circuits are in direct conflict. The court of appeals here twice acknowledged it. App., *infra*, 6a-8a, 17a (recognizing the difference in outcomes in the two cases and reinstating the original decision disagreeing with the *Faris* decision); *id.* at 36a ("[W]e therefore disagree with the Fifth Circuit's analysis."). The Fifth Circuit allows the retrospective release of FMLA claims; the Fourth Circuit forbids it. Accordingly, had this case been filed in Texas, Mississippi, or Louisiana, the outcome would have been exactly the opposite, and the release would have been sustained.[4]

The decisions of district courts are also in conflict, which substantially heightens the legal instability confronting employers and employees. See *Dougherty*, 2007 WL 1165068 (permitting waiver).[5]

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[4] Two other courts of appeals have enforced the settlement of FMLA claims without addressing the Department of Labor's regulation. See *Halvorson* v. *Boy Scouts of America*, No. 99-5021, 2000 WL 571933 (6th Cir. May 3, 2000); *Schoenwald* v. *Arco Alaska, Inc.*, No. 98-35195, 1999 WL 685954 (9th Cir. Aug. 30, 1999).

[5] See also *Brizzee* v. *Fred Meyer Stores, Inc.*, No. 04-1566, 2006 WL 2045857 (D. Or. July 17, 2006) (following the Fourth Circuit and forbidding waiver); and *Dierlam* v. *Wesley Jessen Corp.*, 222 F. Supp. 2d 1052, 1055-56 (N.D. Ill. 2002) (forbidding waiver).

II. The Court Of Appeals' Decision Conflicts With Decisions Of This Court

A. In rejecting the Secretary of Labor's expert interpretation of her own regulation, the court of appeals failed to heed this Court's repeated admonition that an agency's construction of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). This Court reiterated just last Term the importance of such deference, given the Department of Labor's "thorough knowledge of the subject matter" of the statutes it administers and its "ability to consult at length with affected parties." *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2347 (2007); see *id.* at 2349 (citing, *inter alia*, *Auer*).

The court of appeals declined to defer to the Department of Labor's interpretation because the court considered the regulation's meaning to be plain and the Department's position to be inconsistent with the regulatory history. App., *infra*, 3a-16a. That was wrong. To begin with, the fact that other courts have read the regulation's language to mean "plain[ly]" the opposite is strong evidence that the text is at least ambiguous. See *Faris*, 332 F.3d at 321 ("A plain reading of the regulation is that it prohibits prospective waiver of rights, not the post-dispute settlement of claims."); *Dougherty*, 2007 WL 1165068, at *6 n.19 ("the plain text of Section 825.220(d) permits an employee to waive past FMLA claims").

Moreover, as Judge Duncan explained (App., *infra*, 19a), the term "rights" is freighted with ambiguity both in this regulation and generally in the law. See *DiBiase* v. *SmithKline Beecham Corp.*, 48 F.3d 719, 729 (3d Cir.), cert. denied, 516 U.S. 916 (1995);

United States v. *Patrick*, 54 F. 338, 348 (C.C.M.D. Tenn. 1893) ("The words 'rights' or 'privileges' have, of course, a variety of meanings, according to the connection or context in which they are used."); compare *Dennis* v. *Higgins*, 498 U.S. 439, 447-448 (1991), with *id.* at 452 (Kennedy, J., dissenting) (disagreeing over the meaning of the term "right" in 42 U.S.C. 1983).

The Department's resolution of that ambiguity by drawing a distinction between "rights," which cannot be surrendered prospectively, and post-event "claims," which can be released or settled, is reasonable because a "claim" is distinct from a "right." A claim is a mechanism for asserting that a legal right exists and that it has been violated. Indeed, the Department of Labor's distinction not only is reasonable, but also closely tracks this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). In *Alexander*, this Court held that, although "there can be no prospective waiver of an employee's rights under Title VII," an employee "presumably * * * may waive his cause of action under Title VII as part of a voluntary settlement." *Id.* at 51-52.

The court of appeals reasoned (App., *infra*, 5a-6a) that the "rights" that an employee may not waive under the regulation must include the procedural "right" to assert existing FMLA claims. But the language does not compel that conclusion. Employees equally have the procedural "right" to resolve an existing FMLA claim through a settlement or release. An ordinary – indeed, necessary – incident of exercising one's right to press a claim is exercising the right to compromise that claim. Thus, by granting employees an individual cause of action under the FMLA, Congress necessarily granted employees all of

the ordinary attributes of a cause of action, including the discretion to compromise a claim. To hold otherwise would require the unlikely conclusion that Congress wanted to force employees to choose between either ignoring violations of their rights altogether or pressing them unyieldingly against their employer for years. The Department of Labor's careful distinction between prospective rights and the retrospective waiver of litigation claims sensibly avoids that dilemma.

B. The Fourth Circuit's view that the Department of Labor's position has "evolv[ed]," App., *infra*, 6a, likewise provides no basis for withholding deference. First, the agency's view has been consistent. The Department has never stated that the retrospective waiver of FMLA claims is forbidden and, as the Department itself explained to the Fourth Circuit in its *amicus* brief in this case, the Department's litigation position has consistently distinguished between the prospective waiver of rights and the retrospective waiver of claims. See Dep't of Labor C.A. Amicus Br. 2 n.2. Further, the court of appeals' reliance on the murky regulatory history, App., *infra*, 13a-16a, mistakenly perceived a change in position based not on a prior agency statement, but on an "inference[] from agency silence." *Dougherty*, 2007 WL 1165068, at *6 n.20.

In any event, even if the Department of Labor's position had "evolv[ed]," App., *infra*, 6a, this Court reaffirmed just four months ago that an agency's "change in interpretation alone presents no separate ground for disregarding the Department's present interpretation." *Long Island Care*, 127 S. Ct. at 2349. The court of appeals' decision thus squarely conflicts

with this Court's precedent governing deference to an agency interpretation of its own regulation.

C. The court of appeals' decision also disregards this Court's cases enforcing the strong public policy in favor of permitting the private resolution of disputes. This Court has stressed that courts should not conclude that a law or regulation forecloses such private resolution unless that prohibition is compelled by statutory text or purpose. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("[I]f Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."); see also *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Local Number 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 515-516 (1986) (Congress intended "voluntary action" to be the "preferred means of achieving the objectives of Title VII"); *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) ("In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims.").

By giving short shrift to the established policy favoring private dispute resolution, the court of appeals' decision makes the FMLA an outlier in the law and is at odds with this Court's precedents, which have recognized that comparable employee claims under other federal laws can be waived. See *Gilmer*, 500 U.S. at 26-29 (private resolution of claims under the Age Discrimination in Employment Act); *Gardner-Denver*, *supra* (permitting waiver of claims under Title VII); *Local Number 93*, 478 U.S. at 515-516 (Ti-

tle VII); cf. *Clayton* v. *International Union, UAW*, 451 U.S. 679, 692 (1981) (noting "the national labor policy of encouraging private resolution of contractual labor disputes"); *O'Shea* v. *Commercial Credit Corp.*, 930 F.2d 358, 361 (4th Cir.) (waiver of ADEA claims), cert. denied, 502 U.S. 859 (1991); *Runyan* v. *National Cash Register Corp.*, 787 F.2d 1039, 1041-1043 (6th Cir.) (same), cert. denied, 479 U.S. 850 (1986).

The court of appeals' break from Title VII's model is particularly incongruous because the FMLA is designed, in large part, to supplement Title VII in combating gender discrimination in the workplace. See 29 U.S.C. 2601; *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003); 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995) ("FMLA provides the same sorts of protections to workers who oppose, protest, or attempt to correct alleged violations of the FMLA as are provided to workers under Title VII.").

The Fourth Circuit analogized the FMLA to the Fair Labor Standards Act (FLSA), which has been interpreted to restrict private waivers. App., *infra*, 10a-12a. That comparison is misplaced. To begin with, this Court has not held that the FLSA flatly proscribes the private resolution of any claim that might arise under that Act. This Court has held only that questions concerning an employer's coverage and the duty to pay overtime wages under the FLSA may not be waived. See, *e.g.*, *D.A. Schulte, Inc.* v. *Gangi*, 328 U.S. 108, 114-116 (1946); *id.* at 114-115 (reserving the question whether other claims under the FLSA could be waived); *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707-710 (1945). Unlike what the Fourth Circuit now has done with the FMLA, this Court has not held that every right – substantive and

procedural – and every claim under the FLSA is immune to waiver.

Furthermore, this Court has explained that the FLSA's restriction on waivers is rooted in the unique "private-public character" of the right to minimum wage and hours limits. *O'Neil*, 324 U.S. at 709. More specifically, this Court has explained that the FLSA restricts waivers because the Act was itself a response to the "unequal bargaining power as between employer and employee," which led to the need for "compulsory legislation to prevent private contracts" that would endanger the physical "health and well-being" of workers. *Id.* at 706. Forbidding waiver would also prevent employers from "gain[ing] a competitive advantage by reason of the fact that [their] employees are more willing" to work for reduced wages. *Id.* at 710.

The FMLA does not share that unique history, and the knowing and voluntary release of FMLA claims does not trigger those same concerns. While the FMLA promotes important public policies, see *Hibbs, supra,* the FMLA's provisions are not grounded in a premise of health-endangering inequality in bargaining power. The FMLA instead is rooted in principles of workplace equalization and gender equality – similar to the policies that underlie Title VII and the Age Discrimination in Employment Act, which permit releases and settlements. Furthermore, the FMLA's protections are triggered by a variety of individual circumstances, and the scope of the rights applicable in any given case is determined by those same individual circumstances. The FMLA's protections thus do not implicate the across-the-board and workplace-wide concerns reflected in

the FLSA's minimum wage and hour provisions. Nor do alleged violations of the FMLA's individualized protections give rise to concerns about businesses illicitly obtaining a competitive advantage.[6]

The Fourth Circuit's decision thus stands alone in the deep inroads it makes against the public policy favoring private resolution of disputes. The court's decision also lacks any footing in the FMLA itself, where Congress prohibited only "interfer[ing] with, restrain[ing], or deny[ing]" the exercise of FMLA rights. 29 U.S.C. 2615. Indeed, given the strong presumption in favor of permitting private dispute resolution, the structure and purposes of the FMLA, and the lack of any textual basis for broadly proscribing

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[6] The court of appeals noted (App., *infra*, 39a-40a) that the Secretary had analogized the FMLA to the FLSA in the preamble to the regulations. That is true, but it changes nothing. The Secretary said only that the regulation's ban on waivers of rights reflects "sound public policy" under the FMLA just as it does under "other labor standards statutes such as the FLSA." 60 Fed. Reg. at 2218. And the Secretary's position that FMLA rights may not be waived does fully advance sound public policy. What the Secretary did *not* say – but the court of appeals mistakenly inferred – was that the Department intended to handcuff the FMLA to the FLSA for all interpretive purposes. Nor did the Secretary suggest that the FMLA itself is rooted in the same public policy concerns about unequal bargaining power and unfair competitive advantage that underlie the FLSA's distinctly restrictive limitation on private waivers and releases of claims. The FMLA does not share that same history and, as noted by the Secretary just a few paragraphs earlier in the preamble, the FMLA also bears many structural similarities to Title VII, *ibid.* – a statute under which private waivers and releases of claims are not only permitted but encouraged, see, *e.g.*, *Carson*, 450 U.S. at 88 n.14.

private releases or settlements, the sweeping regulatory prohibition on releases or settlements discerned by the Fourth Circuit here would exceed the Department's regulatory authority under the FMLA. Cf. *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81 (2002).

D. Perhaps recognizing the unworkability of its sweeping exclusion of FMLA claims from private resolution, the Fourth Circuit held that private waivers and settlements are permitted if approved by either the Department of Labor or a court. App., *infra*, 16a-17a. That aspect of the decision, however, stands established principles of agency deference on their head. Having read the purportedly "plain" language of the regulation to reject the Department of Labor's own interpretation of its regulation, *id.* at 4a, the court proceeded to craft out of thin air its own codicil to the regulation – an unwritten provision that enlists federal courts and the Department in superintending countless private FMLA settlements and waivers, and that consigns settling employers and employees to navigating a newly minted and as-yet-undefined process of regulatory or judicial approval. If principles of agency deference mean anything, they mean that a court cannot reject an agency interpretation based on "plain language" while simultaneously penning new regulatory language of its own. Cf. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (a "judicial judgment cannot be made to do service for an administrative judgment").

In short, in addition to creating an inter-circuit conflict, the court of appeals' decision has departed so far from this Court's established principles of administrative law and is so disruptive to the established

public policy favoring private resolution of disputes as to warrant this Court's review.

III. The Question Whether FMLA Claims Can Be Waived Is One Of Recurring And Pressing Importance

This Court's review is critical because of the far-reaching implications of the court of appeals' decision and the substantial instability it has introduced into employer/employee relations. The FMLA's coverage is sweeping. According to the Department of Labor, more than 76 million employees in the United States enjoy the protections of the FMLA. 71 Fed. Reg. 69504, 69511 (Dec. 1, 2006). In 2005, more than 10 million employees took leave for reasons covered by the FMLA. *Ibid.*[7]

Given the breadth of the FMLA's coverage, the comprehensiveness of the Fourth Circuit's ban on settlements and releases, the conflict in the circuits, and the conflict between the Fourth Circuit's and the Department of Labor's readings of the Department's own regulation, the court of appeals' decision has left many employers "caught in the middle, wondering which way to go." Jeffery J. Kros, *Courts Split on FMLA Waivers*, Workspan (Oct. 1, 2005). The instability and disuniformity in the law that has been created by the conflicting rulings and positions have significantly disrupted employer/employee relations and efforts to resolve employment disputes privately

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[7] The Department of Labor reported that 13 million workers took leave for reasons covered by the FMLA, but cautioned that its number "may be an upper-bound estimate." 71 Fed. Reg. at 69511.

without resort to court proceedings. The businesses engaged in commerce that are subject to the FMLA, see 29 U.S.C. 2611(4), often operate in multiple jurisdictions and use common severance agreements for their employees nationwide. Uncertainty regarding the legal viability of settlements or releases in severance packages will cause employers to limit or to eliminate offers of extra compensation to departing employees because the agreements will no longer provide end-of-employment closure against one of the most commonly implicated claims. That consequence harms the interests of employees as well as employers.

The division in the law creates particular problems for national companies because the opportunity for private resolution of disputes will now vary within the same company from employee to employee depending on the State in which the employee works or might choose to file suit. See 28 U.S.C. 1391(b)(1) & (c). The variety of venues in which FMLA claims can be filed – which includes the employer's state of incorporation and places of business, *ibid.* – creates a significant risk of forum shopping by employees whose previously resolved claims would be barred in other jurisdictions.

In addition, the question whether claims under a statute as broadly and commonly applicable as the FMLA can be waived or privately compromised has enormous practical, day-to-day implications for businesses and employees alike. Clarity in the law is critical – businesses cannot function in an environment in which the enforceability of settlements and severance agreements turns on and off as the business's operations and employees cross state lines. It

thus is unsurprising that the decision has generated substantial concern in the business community.[8]

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[8] See Earl M. Jones, III, Jason R. Dugas, and Jennifer A. Youpa, *Annual Survey of Texas Law: Employment Law*, 59 S.M.U. L. Rev. 1211, 1211 (Summer 2006) (Fourth Circuit's "startling" decision "takes away employers' security of knowing that a settlement is final and binding"); Whiteford, Taylor & Preston L.L.P., *Employers, Take Note: Your General Release May Not Be as Broad as You Think!*, Maryland Employment Law Letter (September 2005) (Fourth Circuit has "thrown a monkey wrench" into the common practice of providing enhanced severance benefits to departing employees in exchange for a general waiver and release of claims); Judy Greenwald, *Decision Limiting FMLA Waivers Creates Employer Headaches*, Business Insurance (Aug. 8, 2005) (Fourth Circuit creates a "land mine" for both employers and employees); *Can an Employer Secure the Release of an FMLA Claim in the 4th Circuit?*, Lab. & Emp. Update (Buchanan Ingersoll PC, Pittsburgh, Pa.), Nov. 2005, at 5; *The Family and Medical Leave Act Bars Waivers – Or Does It?*, Emp. L. Alert (Nixon Peabody LLP, New York, NY), Feb. 2004, at 2-3; *Fourth Circuit Rules that Employees Cannot Waive Their FMLA Rights Without Court or DOL Approval*, Alert (Greenberg Traurig, New York, N.Y.), July 2005, at 1-3; Ed Harold, *Woman Takes Money, Signs Release, Sues Anyway; Fourth Circuit Says "Okay,"* Lab. Letter (Fisher & Phillips LLP, Atlanta, Ga.), Sept. 2005, at 3; Melissa M. Kidd, *Fourth Circuit Holds that a General Release Is No Bar to FMLA Claims*, Workcite Emp. & Benefits Legal Update (Helms Mulliss Wicker, Charlotte, N.C.), Aug. 18, 2005, http://www.hmw.com/workcite/20050818.htm.; Joseph P. Harkins & Gary D. Shapiro, *Leave it Out? Family and Medical Leave Act Claims May No Longer Be Waived by a General Release*, ASAP (Littler Mendelson, P.C., S.F., Cal.), Aug. 2005, at 2; David K. Haase & John W. Drury, *Court Finds a Trap Hidden in Separation Agreements: The 4th Circuit Says Employees Cannot Waive Any FMLA Claims*, Nat'l L. J., Jan. 9, 2006; Peter A. Susser, *Court Says Waiving FMLA Rights Not Allowed*

The disruption caused by the court of appeals' decision does not stop there. The court has also adopted a rule that – without any anchor in statutory or regulatory text – requires the Department of Labor to establish a program for the review and approval "in a prompt and efficient manner" of potentially thousands of private releases and settlement agreements. App., *infra*, 16a; see also DOL C.A. Amicus Br. at 9. Unless this Court grants review, the Department of Labor will be required to devote scarce agency resources to both the creation of a new administrative process and the formulation of new legal standards for reviewing and approving FMLA waivers and settlements.

The Fourth Circuit also directed federal district courts to interpose themselves and begin "supervising settlements in court actions brought pursuant to the FMLA." *Id.* at 17a. Federal courts accordingly will have to develop procedures and case law to govern the processes and standards for judicial approval of FMLA settlements, and they must do so without the benefit of any statutory reference point. Moreover, the courts must find a way to perform their new supervisory task that comports with the federal courts' delimited role under Article III and its "case" or "controversy" requirement, see U.S. Const. Art. III, § 2.It is, of course, possible that the Department of Labor could amend its regulation. See 71 Fed. Reg. 69504, 69509-10 (Dec. 1, 2006) (broadly inviting public comment "on all issues related to [its] FMLA regu-

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Unless It Is Approved, Family and Medical Leave Handbook (Thompson, New York, N.Y.), Sept. 2007, at 1.

lations," and referencing 29 C.F.R. 825.220(d) as one of twelve potential issues). But at this juncture, any such amendment is hypothetical, because the Department has not stated its intention to propose an amendment to the regulation. Beyond that, even were such an amendment to be proposed, its adoption and implementation could be delayed for years by the rulemaking process and the resolution of any ensuing challenges under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

In the meantime, the courts and the Department would have to implement and develop processes and legal standards for review; employers and employees would continue to endure critical uncertainty in the law; employers who have already entered into private FMLA settlements or severance agreements would be denied the closure for which they and the employee contracted; and employers would remain subject to unwarranted and burdensome suits based upon faulty precedent. Even upon the adoption of such a regulation, moreover, substantial debate and litigation would ensue over its retroactive application, leaving in question the validity of existing releases in every jurisdiction other than the Fifth Circuit.

In *Ragsdale*, supra, this Court granted review to address the proper interpretation of a Department of Labor regulation under the FMLA in a case that, as here, presented a two-circuit split. See No. 00-6029 Pet. 11-12 *Ragsdale, supra*; No. 00-6029 U.S. Cert. Br. at 16-20, *Ragsdale, supra.* This case has even greater need for this Court's intervention, given not just the conflict with the Fifth Circuit and this Court's precedents governing both agency deference and the private resolution of disputes, but also the

far-reaching implications of the Fourth Circuit's decision for tens of thousands of employers and employees, for the public policy in favor of private settlement, and for the viability of thousands of already executed settlements and waivers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ON REHEARING
PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BARBARA TAYLOR,
Plaintiff-Appellant,
v.

PROGRESS ENERGY, INCORPORATED,
Defendant-Appellee.

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; NORTH CAROLINA ACADEMY OF TRIAL LAWYERS,
Amici Supporting Appellant,

EQUAL EMPLOYMENT ADVISORY COUNCIL; SOCIETY FOR HUMAN RESOURCE MANAGEMENT; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; ELAINE CHAO, Secretary of Labor,
Amici Supporting Appellee.

No. 04-1525

Appeal from the United States District Court
for the Eastern District of North Carolina, at Wilmington.
Malcolm J. Howard, District Judge.
(CA-03-73-7-H)

Argued: October 25, 2006
Decided: July 3, 2007

Before MICHAEL and DUNCAN, Circuit Judges, and Robert E. PAYNE, United State District Judge for the Eastern District of Virginia, sitting by designation.

Opinion reinstated by published opinion. Judge Michael wrote the majority opinion, in which Judge Payne joined. Judge Duncan wrote a dissenting opinion.

COUNSEL

ARGUED: April Gordon Dawson, DAWSON, DAWSON & DAWSON, P.A., Graham, North Carolina, for Appellant. Zebulon Dyer Anderson, SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P., Raleigh, North Carolina, for Appellee. Howard Marc Radzely, UNITED STATES DEPARTMENT OF LABOR, Office of the Solicitor, Washington, D.C., for Elaine Chao, Secretary of Labor, Amicus Supporting Appellee. **ON BRIEF:** Robert M. Elliot, J. Griffin Morgan, ELLIOT, PISHKO, MORGAN, P.A., Winston-Salem, North Carolina, for National Employment Lawyers Association and North Carolina Academy of Trial Lawyers, Amici Supporting Appellant; Marissa M. Tirona, THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA), San Francisco, California, for National Employment Lawyers Association, Amicus Supporting Appellant. Stephen A. Bokat, Robin S. Conrad, Robert J. Costagliola, NATIONAL CHAMBER LITIGATION CENTER, INC., Washington, D.C., for The Chamber of Commerce of the United States of America; Ann Elizabeth Reesman, MCGUINESS, NORRIS & WILLIAMS, L.L.P., Washington, D.C., for Equal Employment Advisory Council and Society for Human Resource Management, Amici Supporting Appellee. Steven J. Mandel, Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, Lynn S. McIntosh, UNITED STATES DEPARTMENT OF LABOR, Office of the Solicitor, Washington, D.C., for Elaine Chao, Secretary of Labor, Amicus Supporting Appellee.

OPINION

MICHAEL, Circuit Judge:

The central issue in this appeal, now before us on rehearing, is the meaning of 29 C.F.R. § 825.220(d) (section 220(d)), a regulation implementing the Family and Medical Leave Act of 1993 (FMLA or Act), 29 U.S.C. § 2601 *et seq.* The regulation reads: "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." In our vacated opinion we held that the regulation prohibits both the prospective and retrospective waiver of any FMLA right unless the waiver has the prior approval of the Department of Labor or a court. *Taylor v. Progress Energy, Inc.* (*Taylor I*), 415 F.3d 364, 369 (4th Cir. 2005), *vacated*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006). The losing party (the defendant) in *Taylor I* filed a petition for rehearing en banc, and the Secretary of Labor (the DOL) filed an amicus brief in support of that petition. The DOL disagreed with our interpretation of section 220(d), and we granted panel rehearing to consider the DOL's contrary interpretation. The case was reargued, this time with the agency participating. The DOL contends that section 220(d) bars only the prospective waiver of FMLA rights. After reconsideration we remain convinced that the plain language of section 220(d) precludes both the prospective and retrospective waiver of all FMLA rights, including the right of action (or claim) for a past violation of the Act. We therefore reinstate our opinion in *Taylor I.*

I.

An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks and citation omitted). As we will demonstrate, the DOL's interpretation of section 220(d) is inconsistent with the regulation.

A.

Again, the regulation states: "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. § 825.220(d). The DOL contends that in *Taylor I* we erred in interpreting section 220(d) by failing to focus on the word "rights." In its amicus brief to us the DOL argued that the word "rights" does not include claims. Later, the DOL substantially undercut this argument in an amicus brief filed in the Eastern District of Pennsylvania. In *Dougherty v. TEVA Pharms. USA, Inc.*, No. 05-2336, 2007 U.S. Dist. LEXIS 27200 (E.D. Pa. Apr. 11, 2007), the DOL conceded that the "right to sue," that is, the right to assert a *claim*, is a "right under the FMLA" that cannot be waived prospectively under the regulation. Brief of Secretary of Labor as Amicus Curiae at 4 n.6, *Dougherty*, 2007 U.S. Dist. LEXIS 27200 (*Dougherty* Amicus Br.). We will consider the DOL's shifting arguments momentarily, but first we will explain why the section 220(d) phrase "rights under FMLA" plainly includes *claims* under the FMLA. The explanation is simple.

There are three categories of "rights under FMLA," substantive, proscriptive, and remedial. Substantive

rights include an employee's right to take a certain amount of unpaid medical leave each year and the right to reinstatement following such leave. 29 U.S.C. §§ 2612(a)(1)(D), 2614(a)(1). Proscriptive rights include an employee's right not to be discriminated or retaliated against for exercising substantive FMLA rights. *Id.* § 2615(a)(2). The remedial right is an employee's "[r]ight of action," or "right . . . to bring an action" or claim, "to recover [ ] damages or [obtain] equitable relief" from an employer that violates the Act. *Id.* §§ 2617(a)(2), (a)(4). The regulation, by specifying "rights under FMLA," therefore refers to *all rights* under the FMLA, including the right to bring an action or claim for a violation of the Act.

This reading is confirmed by the regulation's relationship to § 2615(a)(1) of the statute. Section 2615(a)(1) makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, *any right* provided under [the FMLA]." (emphasis added). The regulation implements (among others) this statutory provision, making clear that an employer cannot "induce employees to waive[ ] their rights under FMLA" because that would interfere with an employee's exercise of, or attempt to exercise, FMLA rights. *See* 29 C.F.R. § 825.220(d). Because § 2615(a)(1) prohibits employer interference with "any right provided under [the FMLA]," including § 2617(a)(2)'s right of action, the regulation's phrase, "rights under FMLA," also refers to the statutory right of action or claim.

Section 220(d)'s use of the word "rights" to refer to a right of action or claim is consistent with common usage. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S.

697, 705 (1945) (stating that an employee's Fair Labor Standards Act (FLSA) claim for liquidated damages is a "statutory right" that cannot not be waived in a settlement agreement); Black's Law Dictionary 1348 (8th ed. 2004) (defining "legal right" as "[t]he capacity of asserting a legally recognized claim against one with a correlative duty to act").

For all of these reasons, section 220(d)'s prohibition on the waiver of rights includes a prohibition on the waiver of claims.

We now turn to the specifics of the DOL's evolving argument. In its amicus brief to us the agency points out that "the regulation refers only to the waiver of FMLA '*rights*' and makes no mention of the settlement or release of *claims*." DOL Amicus Br. at 4. Thus, the DOL starts out with the assertion that section 220(d) "regulates only the prospective waiver of FMLA *rights*, not the retrospective settlement of FMLA *claims*." *Id.* But the DOL then seeks to narrow the scope of the regulation even further by adopting the holding of *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). *See* DOL Amicus Br. at 6 (noting "Department's and [*Faris*'s] plain reading" of section 220(d)); *id.* at 4-5 (endorsing district court's "correct[ ] conclu[sion]," which is identical to *Faris*'s, as to the meaning of section 220(d)). *Faris* held that the regulation prohibits only the prospective waiver of the FMLA's *substantive* rights. 332 F.3d at 322.

In endorsing the *Faris* holding, the DOL advanced an interpretation of the regulation that would allow an employee to waive prospectively her proscriptive and remedial rights under the FMLA. Thus, on her

first day on the job an employee could prospectively waive (1) her proscriptive right to be free from employer retaliation for her attempts to exercise FMLA rights and (2) her right to sue for an employer's refusal to grant FMLA leave. This interpretation would undermine the purpose of the FMLA and section 220(d) and turn the FMLA's substantive rights into empty and unenforceable pronouncements.

The DOL acknowledged this problem in its later-filed amicus brief in *Dougherty*, where it rejected *Faris*'s determination that the regulation applies only to substantive rights. *Dougherty* Amicus Br. at 4 n.6. There, the DOL recognized that the "right to sue" (or assert a claim) is also a "right under the FMLA" that cannot be waived prospectively.[1] *Id.* The DOL thus abandoned its previous position that section 220(d) does not prohibit the waiver of any claim. According to the DOL's most recent interpretation, an employee cannot prospectively waive claims for future violations of the FMLA, but she can waive claims for past violations. The relevant distinction for the DOL is therefore between prospective and retrospective waivers, not between rights and claims as it argued in its amicus brief before this court.

There is nothing in the text of section 220(d) that permits a distinction between prospective and retrospective waivers. The regulation states plainly

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[1] The DOL characterizes the right to sue as a proscriptive right. See Dougherty Amicus Br. at 4 n.6. The right to sue for violations of the FMLA, see 29 U.S.C. § 2617(a)(2), is better characterized as a remedial right. Nevertheless, we agree that the right to sue is a "right under the FMLA."

that "[e]mployees cannot waive . . . their rights under FMLA." 29 C.F.R. § 825.220(d). As we pointed out in *Taylor I*, the word "waive" has both a prospective and retrospective connotation. 415 F.3d at 370. Courts, including the Supreme Court, frequently use the word "waive" to refer to the post-dispute or retrospective release or settlement of claims. *See, e.g.*, *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426-27 (1998) ("An employee may not waive an ADEA claim unless the waiver or release satisfies [statutory] requirements.") (internal quotations omitted); *Brooklyn Sav. Bank*, 324 U.S. at 710 (stating that employee could not "waive claim[ ] for liquidated damages" against employer for past violations of the FLSA); *Jefferson v. Vickers, Inc.*, 102 F.3d 960, 964 (8th Cir. 1996) (stating that an employer can condition certain retirement benefits on an employee's "waiver of employment claims"); *Allen v. Sybase, Inc.*, 468 F.3d 642, 646 (10th Cir. 2006) (noting that employees signed a release form "in which they waived any claims they had against the company"). Because the word "waive" has a retrospective connotation, the regulation applies to the retrospective waiver of claims.

B.

The DOL urges us to consider the recent *Dougherty* decision in the Eastern District of Pennsylvania. 2007 U.S. Dist. LEXIS 27200. There, the court, on reasoning developed on its own, reached the result sought by the DOL. The court held that section 220(d) does not prohibit the retrospective waiver or settlement of a claim because "the decision to bring a claim" is not a right under the FMLA. *Id.* at *23. The

reasoning behind this holding does not withstand close analysis.

The court first stated that section 220(d) prohibits waivers of the FMLA's "substantive protections (i.e. FMLA leave) and its proscriptive ones (i.e. right to sue for retaliation)."[2] *Id.* at *24. It concluded, however, that retrospective waivers are permissible because the "decision to bring a claim (saying that you are going to *exercise* your right to sue) is not a separate right under the FMLA." *Id.* (emphasis in original). It added, "Nowhere does the FMLA (or the regulation) mandate that an aggrieved employee must exercise her proscriptive rights and bring an FMLA claim." *Id.*

To begin with, *Dougherty*'s conclusion — that "the ability [or decision] to bring [an FMLA] claim" is "a kind of right" but not a "right under the FMLA" — ignores FMLA's text. The FMLA explicitly makes the "right . . . to bring an action" or claim for a violation a right under the Act. *See* 29 U.S.C. §§ 2617(a)(2), (a)(4).

Moreover, *Dougherty* confuses the decision to exercise rights with waiver of rights. The regulation does not prevent an employee from deciding not to exercise her FMLA rights. An employee denied FMLA leave could, for example, decide initially not to bring a claim for the violation. This employee does not waive any rights because she could reconsider and decide to bring a claim at a later time. However, an employee who signs a release or settlement

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[2] The Dougherty court, like the DOL, categorizes the right to sue as a proscriptive right. 2007 U.S. Dist. LEXIS 27200, at *21.

agreement does more than *decide* not to exercise her right to sue; she relinquishes that right entirely. While section 220(d) does not prevent an employee from deciding not to exercise the right to sue, it does prevent her from waiving or relinquishing that right.

We are not persuaded by the reasoning in *Dougherty*.

C.

The DOL contends that its reading of section 220(d) "is consistent with the well-accepted policy disfavoring prospective waivers [of rights], but encouraging settlement of claims, in employment law." DOL Amicus Br. at 5. This statement overlooks an important exception in employment law to the general policy favoring the post-dispute settlement of claims. The settlement or waiver of claims is not permitted when "it would thwart the legislative policy which [the employment law] was designed to effectuate." *Brooklyn Sav. Bank*, 324 U.S. at 704.

For example, under the FLSA, a labor standards law, there is a judicial prohibition against the unsupervised waiver or settlement of claims. *See D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114-16 (1946). In the FLSA, Congress, among other things, prescribes a minimum wage to foster the "minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). Any wage settlement that gave the employee less than the statutory minimum would frustrate Congress's objective of imposing uniform minimum pay requirements. *See Barrentine v. Arkansas-Best*

Freight Sys., Inc., 450 U.S. 728, 740 (1981) (stating that waivers of FLSA rights and claims would nullify the congressional purpose of imposing nationwide minimum standards of employment). Moreover, allowing below-minimum pay through settlement discounts would permit an employer to evade the FLSA and gain an unfair competitive advantage. *See Brooklyn Sav. Bank*, 324 U.S. at 710.

The reasons for the prohibition on private settlement of FLSA claims apply with equal force to FMLA claims. Congress explains in the FMLA's legislative history that the Act "fits squarely within the tradition of the labor standards laws that . . . preceded it," such as the FLSA and the Occupational Safety and Health Act. S. Rep. No. 1033, at 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 7. The FMLA, following the FLSA model, provides a "minimum floor of protection" for employees by guaranteeing that a minimum amount of family and medical leave will be available annually to each covered employee. *Id.* at 18. As with the FLSA, private settlements of FMLA claims undermine Congress's objective of imposing uniform minimum standards. Because the FMLA requirements increase the cost of labor, employers would have an incentive to deny FMLA benefits if they could settle violation claims for less than the cost of complying with the statute. Further, employers settling claims at a discount would gain a competitive advantage over employers complying with the FMLA's minimum standards. *See Taylor I*, 415 F.3d at 375. To avoid these problems, section 220(d) follows the FLSA model and prohibits the waiver of all FMLA rights. All employers are held to providing the minimum leave specified, without the

option to deny it and buy out claims at a later date.

The DOL fails in its attempt to analogize the FMLA to Title VII and the Age Discrimination in Employment Act (ADEA), under which the retrospective waiver of claims is allowed. To begin with, neither Title VII nor the ADEA has an implementing regulation, like section 220(d), that prohibits the waiver of all rights under the statute.[3] Furthermore, Title VII and the ADEA are not labor standards laws like the FMLA. Rather, Title VII and the ADEA were enacted to outlaw discrimination against specific classes of employees and provide redress for injuries caused by discrimination. *See Landgraf v. Usi Film Prods.*, 511 U.S. 244, 254 (1994). Private settlements further these purposes by imposing a cost on discrimination that encourages compliance. The same cannot be said with respect to the FMLA, where settlements that are cheaper than compliance would encourage noncompliance, thereby undermining the Act's purpose of imposing minimum standards for family and medical leave. In short, Title VII and the ADEA do not provide the best settlement model for the FMLA. Congress has indicated as much by analogizing the FMLA to the FLSA, under which the private settlement of claims is prohibited. 29 U.S.C. §§ 2616, 2617(b); *see also* S. Rep. 103-3, at 35 (1993), *reprinted in* 1993

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[3] Such a regulation would not be possible under either Title VII or the ADEA. The Equal Employment Opportunity Commission, the agency charged with the administration and enforcement of Title VII, lacks authority to issue binding substantive regulations with respect to that statute. *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); 42 U.S.C. § 2000e-12(a). The ADEA, for its part, specifically authorizes the "knowing and voluntary" retrospective waiver of claims. *See* 29 U.S.C. § 626(f)(1).

U.S.C.C.A.N. 3, 37 (stating that the FMLA's "enforcement scheme is modeled on the enforcement scheme of the FLSA"). Indeed, as we discuss in part II, the DOL itself likened the FMLA to the FLSA when it promulgated section 220(d) and prohibited employee waiver of all FMLA rights.

II.

The DOL's present interpretation of section 220(d) is also inconsistent with what the DOL said it intended the regulation to mean at the time it was promulgated. We do not defer to an agency's interpretation if "an alternative reading is compelled by . . . indications of the Secretary's intent at the time of the regulation's promulgation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citation omitted). As we pointed out in *Taylor I*, when the regulation was being finalized, the DOL specifically considered and rejected proposed amendments that would have permitted the interpretation now advanced by the DOL. *See* 415 F.3d at 370-71. In the "Summary of Major Comments" published in the 1995 preamble to the final version of section 220(d) and other FMLA implementing regulations, the DOL acknowledged the concerns expressed by the U.S. Chamber of Commerce and several corporations regarding "the 'no waiver of rights' provisions" in section 220(d). Preamble to the Final Regulations Implementing the Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995). These representatives of business "recommended explicit allowance of waivers and releases in connection with [the] settlement of FMLA claims and as part of a severance package (as allowed under Title VII and

ADEA claims, for example)." *Id.* In response the DOL explained that it had "given careful consideration to the comments on this section [section 220(d)] . . . and . . . concluded that prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the FLSA." *Id.* By rejecting business's suggestion that the regulation be modified to permit waivers and releases in connection with the *settlement* of FMLA claims, the DOL made clear that it intended for section 220(d) to prohibit the retrospective waiver of claims.

The DOL now says that it actually made no response to the claims settlement comment from the business representatives. According to the DOL, our decision in *Taylor I* "incorrectly interpreted the Department's silence as to the retrospective settlement of FMLA claims in the preamble to the final regulations as an indication that such settlements are prohibited under section 220(d)." DOL Amicus Br. at 9. The DOL asks us to take what it calls silence "as an indication that it did not perceive [retrospective] settlements as falling within the scope of the regulation." *Id.* The DOL was not silent. It did respond and its response must take into account the comment. The comment could not have been clearer: business representatives asked for an amendment to the proposed regulation that would explicitly allow "waivers and releases in connection with *settlement* of FMLA claims," that is, claims for past violations. 60 Fed. Reg. at 2218. The DOL's response was likewise clear. The agency said it had

carefully considered the comment, indicating that it fully understood what the comment proposed. *Id.* The DOL then rejected the proposal with its conclusion "that prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the FLSA." *Id.* The clarity and firmness of the DOL's rejection of the comment is underscored by the agency's statement that it was adopting the same no-waiver-of-rights policy that applies to the FLSA. Under the FLSA, of course, the unsupervised settlement of claims is not allowed.

The DOL also argues that its statement in the preamble that "an employee on FMLA leave may be required to give up his or her remaining FMLA leave entitlement to take an early-out offer from the employer," 60 Fed. Reg. at 2219, made clear that section 220(d) would not affect releases in connection with severance packages. We disagree. This statement only addressed the ERISA Industry Committee's concern that an employee who takes early retirement while on FMLA leave might continue to assert leave rights, such as the right to continuing group health coverage. The DOL's response simply clarifies that the employee does not waive any FMLA rights in this circumstance because the employee's right to FMLA leave ends with the cessation of the employment relationship. *See Brohm v. JH Props., Inc.*, 149 F.3d 517, 523 (6th Cir. 1998) (holding that employee who received medical treatment a week after he was fired was not eligible for FMLA leave). The response does not imply that an employee who accepts an early retirement may

waive her right of action for past FMLA violations, for that right would extend beyond the end of employment.

For these reasons we adhere to our *Taylor I* assessment of the DOL's intent at the time of section 220(d)'s promulgation: "By rejecting business's suggestion that waivers and releases should be allowed in connection with the post-dispute settlement of FMLA claims, the DOL made clear that § 825.220(d) was never intended to have only prospective application." 415 F.3d at 371. As a result, we do not defer to the completely different interpretation of the regulation that the DOL advances in this case. *See Thomas Jefferson Univ.*, 512 U.S. at 512.

III.

In *Taylor I* we relied on the congressionally recognized similarities between the FMLA and the FLSA to conclude that section 220(d) "must be construed to allow the waiver or release of FMLA claims with prior DOL or court approval," as is the case with respect to FLSA claims. 415 F.3d at 374. The DOL asserts that "the requirement of Department or court supervision" will create added burdens on the DOL and the courts and "will harm employees by delaying resolution of their cases." DOL Amicus Br. at 15. We are confident that both the DOL and the courts will work diligently to deal with these cases in a prompt and efficient manner. The DOL already has a system in place for reviewing FMLA claim settlements in administrative cases, and it has had even broader experience in supervising

FLSA settlements. The courts will only be supervising settlements in court actions brought pursuant to the FMLA, and we do not believe that this responsibility will create an undue burden.[4]

IV.

We reaffirm our conclusion that, without prior DOL or court approval, 29 C.F.R. § 825.220(d) bars the prospective and retrospective waiver or release of rights under the FMLA, including the right to bring an action or claim for a violation of the Act. We therefore reinstate our prior opinion in *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005).

IT IS SO ORDERED.

DUNCAN, Circuit Judge, dissenting:

The Family and Medical Leave Act (the "FMLA") provides aggrieved employees with a "[r]ight of action," 29 U.S.C. § 2617(a)(2), or a "right . . . to bring an action," *id.* § 2617(a)(4), against an employer who commits any of the acts prohibited by the statute. The Department of Labor (the "DOL"), in its regulations implementing the FMLA, has declared:

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[4] We note that the DOL appears to have section 220(d) under consideration in connection with its rulemaking responsibilities under the FMLA. Shortly after oral argument the DOL issued a notice that includes a request for public comment on section 220(d). Request for Information on the Family and Medical Leave Act of 1993, 71 Fed. Reg. 69504, 69509-10 (Dec. 1, 2006). The notice sets forth our interpretation of the regulation in *Taylor I* and notes that the agency argued for a different interpretation in its post-decision amicus brief. The notice's information request — couched in language that telegraphs the DOL's current interpretation – "seeks input on whether a limitation should be placed on the ability of employees to settle their past FMLA claims." *Id.*

"Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. § 825.220(d). The crux of the majority's reasoning is that "[t]he regulation, by specifying 'rights under FMLA,' . . . refers to *all rights* under the FMLA," Majority Op. at 4, including in particular the "*[r]ight* of action" or "*right* . . . to bring an action" described in § 2617(a)(2), (4) (emphasis added).

The majority's position is, standing alone, eminently reasonable. Indeed, we defensibly so held after first hearing oral argument in this appeal. *See Taylor v. Progress Energy, Inc.* (*Taylor I*), 415 F.3d 364, 369 (4th Cir. 2005), *vacated*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006). We reached our decision guided by established rules of statutory construction appropriate for the procedural posture of the case as it then existed. *See id.* The majority clearly and thoughtfully recounts that analysis here.

The course of this appeal was unexpectedly diverted, however, when the DOL rejected the analysis of *Taylor I* in its belated amicus brief supporting Progress Energy's petition for rehearing en banc. *See* Amicus Br. for Secretary of Labor at 4 (interpreting the regulation not to prohibit the waiver of causes of action). After such interposition, the question in the case was necessarily recast. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (recharacterizing the central issue in the case, after the Secretary of Labor filed an amicus brief, as whether the Secretary's interpretation of his own regulations is "plainly erroneous or inconsistent with the regulation" (internal quotations omitted)).

Therefore, the issue before us is no longer whether the interpretation that we adopted in *Taylor I* was reasonable, but rather whether it is compelled by the language of the regulation.

I feel constrained to conclude that it is not. There are few words in the legal lexicon more ubiquitous and freighted than the term "right." *See United States v. Patrick*, 54 F. 338, 348 (C.C.M.D. Tenn. 1893) ("The words 'rights' or 'privilege' have, of course, a variety of meanings, according to the connection or context in which they are used."); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 30-31 (1913) ("[T]he term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense; and this looseness of language is occasionally recognized by the authorities. . . . [W]e must . . . recogniz[e] . . . the very broad and indiscriminate use of the term 'right.'" (internal punctuation altered)). The mere fact that the statute creates a "[r]ight of action," 29 U.S.C. § 2617(a)(2), and the regulation refers to "rights under FMLA," 29 C.F.R. 825.220(d), may suggest, but does not compel, an interpretation that the two uses of the word are coextensive. In light of the elasticity of the term "right," it is not clear to me that "rights under FMLA" on its face subsumes accrued causes of action.

Given the existence of at least some measure of ambiguity in the regulation's use of the term "rights," then, I cannot but conclude that deference to the DOL's interpretation is appropriate under *Auer*, 519 U.S. at 461. *See Christensen v. Harris County*, 529

U.S. 576, 588 (2000) ("*Auer* deference is warranted . . . when the language of the regulation is ambiguous."); *Humanoids Group v. Rogan*, 375 F.3d 301, 306 (4th Cir. 2004). I am further unpersuaded by any suggestion that the inconsistencies in the DOL's interpretation of the regulation over time must lessen the level of deference to be accorded its present view. *See Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. ___, ___, slip op. at 10-11 (2007) ("[A]s long as interpretive changes create no unfair surprise—and the Department's recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation makes any such surprise unlikely here—the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation." (internal citations omitted)); *cf.* Majority Op. at 12 n.4 (noting that the DOL has issued notice that it is considering modifying the regulation to codify unambiguously its present interpretation).

Nevertheless, I fully agree that the history of the regulation at issue provides a model of how *not* to proceed during the rulemaking process. *See* Majority Op. at 9-12. Furthermore, timely intervention by the DOL before we issued *Taylor I* would have obviated the necessity of an additional hearing in this appeal, with its attendant expenditure of judicial and party resources.

With these cautionary addenda, I respectfully dissent.

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

BARBARA TAYLOR,
Plaintiff-Appellant,
v.
PROGRESS ENERGY, INCORPORATED,
Defendant-Appellee.

No. 04-1525

Appeal from the United States District Court
for the Eastern District of North Carolina, at Wilmington.
Malcolm J. Howard, District Judge.
(CA-03-73-7-H)

Argued: February 1, 2005
Decided: July 20, 2005

Before MICHAEL and DUNCAN, Circuit Judges, and Robert E. PAYNE, United State District Judge for the Eastern District of Virginia, sitting by designation.

Reversed in part, vacated in part, and remanded by published opinion. Judge Michael wrote the opinion, in which Judge Duncan and Judge Payne joined.

COUNSEL

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ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, Raleigh, North Carolina, for Appellee.

OPINION

MICHAEL, Circuit Judge:

Barbara Taylor sued Progress Energy, Inc. (Progress), the parent company of her former employer, Carolina Power & Light Company (CP&L), alleging violations of her rights under the Family and Medical Leave Act of 1993 (FMLA or Act), 29 U.S.C. § 2601 *et seq.*, including the violation of (1) her substantive right to twelve weeks of unpaid leave to deal with a serious health condition and (2) her proscriptive right not to be discriminated or retaliated against for exercising her substantive FMLA rights. Progress argued in its motion for summary judgment that a release Taylor signed constituted a valid waiver of her FMLA claims. The district court granted Progress's motion, thereby rejecting Taylor's argument that 29 C.F.R. § 825.220(d), a Department of Labor (DOL) regulation, bars the waiver or release of FMLA rights. We conclude that § 825.220(d) prohibits the release as it relates to Taylor's FMLA claims and that the regulation is valid under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We therefore reverse the district court's summary judgment order and remand for further proceedings.

I.

Because the district court granted Progress's motion for summary judgment, we state the facts in

the light most favorable to Taylor, the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In 1993 Taylor started working for CP&L, a subsidiary of Progress, in the Document Services Unit at the Brunswick Nuclear Plant in North Carolina. She was originally hired as a technical aide and later became a data management assistant. In April 2000 she began experiencing extreme pain and swelling in her right leg. Taylor consulted her doctor, who ordered a week of bed rest that caused her to miss five days of work in late April or early May. The doctor informed Taylor that she would need to undergo a series of medical tests, including heart tests, in an effort to determine the cause of her symptoms. Thereafter, during the months of June and July, Taylor missed a number of days of work due to medical testing and treatment. Immediately after her first health-related absence in April or May, and again when she had to miss work for medical tests in June and July, Taylor asked a representative of CP&L's human resources department about the possibility of leave under the FMLA. The representative told Taylor that she was not eligible for FMLA leave because she had not been absent from work for more than five consecutive days at any one time.

In August 2000 Taylor underwent a spinal tap in a further effort to determine the cause of her health problems. Complications from this procedure caused her to miss a full week (five days) of work and additional days in the following weeks. In October Taylor received a written warning from her supervisor and the human resources representative stating that she "had exceeded the company's average

sick time." J.A. 53. When Taylor sought guidance on how best to handle her health-related absences, she was told simply that she needed to improve her attendance. In November Taylor underwent more testing that kept her out of work for another five days. This testing revealed that an abdominal mass was the cause of the pain and swelling in Young's leg, and her doctor recommended immediate surgery to remove the mass. Taylor informed the human resources representative of the most recent test results and again asked whether any of her missed time from work qualified as FMLA leave. Again, the departmental representative answered that the missed time did not qualify because Taylor had not been out of work for more than five consecutive days. Taylor had surgery to remove the abdominal mass in December 2000. She was out of work for approximately six weeks and was told that this period qualified as FMLA leave. Taylor later discovered that she had been credited with FMLA leave for only four of these six weeks.

In February 2001 Taylor received her performance evaluation for the prior year. She was given a poor productivity rating because of her health-related absences, and she received only a one-percent pay raise while the average raise given by CP&L was approximately six percent. Soon thereafter (in March), Taylor learned that CP&L planned to lay off some of its employees in a reduction in force and that the company intended to select employees for dismissal based, at least in part, on past performance. Taylor contacted the DOL about CP&L's refusal to grant her FMLA leave and was told that her prior medical leave qualified under the

FMLA and that FMLA absences could not be counted against her for any reason.

In an effort to save her job, Taylor asked CP&L on several occasions to correct her 2000 performance evaluation to reflect that her various absences qualified as FMLA leave. A human resources representative denied Taylor's requests, and the company informed her about two weeks later (on May 17, 2001) that her employment was being terminated. Taylor was told that she was eligible for benefits under CP&L's transition plan, which included seven weeks of paid administrative leave. She was also told that she would receive additional benefits (including monetary compensation) if she signed and returned a general release and severance agreement (the release) within forty-five days. Taylor signed and returned the release to CP&L on June 4. The relevant section reads as follows:

> *GENERAL RELEASE OF CLAIMS.* IN CONSIDERATION OF SEVERANCE PAYMENTS MADE BY THE COMPANY, EMPLOYEE HEREBY RELEASES CP&L [AND] ITS PARENT . . . FROM *ALL* CLAIMS AND WAIVES *ALL* RIGHTS EMPLOYEE MAY HAVE OR CLAIM TO HAVE RELATING TO EMPLOYEE'S EMPLOYMENT WITH CP&L . . . OR EMPLOYEE'S SEPARATION THEREFROM, arising from events which have occurred up to the date Employee executes this General Release, including *but not limited to*, claims . . . for relief, including *but not limited to*, front pay, back pay, compensatory damages,

> punitive damages, injunctive relief, attorneys' fees and costs or any other remedy, arising under: (i) the Age Discrimination In Employment Act of 1967, as amended, ("ADEA"); (ii) the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"); (iii) Title VII of the Civil Rights Act of 1964, as amended; (iv) the Energy Reorganization Act and Atomic Energy Act, both as amended; (v) the Americans With Disabilities Act ("ADA"); (vi) any wrongful termination claim under any state or federal law; (vii) claims for benefits under any employee benefit plan maintained by CP&L related to service credits or other issues; (viii) claims under the Older Workers Benefit Protection Act of 1990 ("OWBPA"); and (ix) any other federal, state or local law.

J.A. 18. Thus, while the release does not mention FMLA claims by name, it does include a catchall category for "other federal . . . law" claims besides those specifically listed. *Id.* On July 20, 2001, CP&L sent Taylor a check for approximately $12,000 pursuant to the terms of the release and related documents. (Taylor did not return the money when she later filed this action against Progress.)

After her separation from CP&L, Taylor again contacted the DOL concerning the company's failure to designate her health-related absences as FMLA leave, the resulting negative performance evaluation, and the company's use of the negative evaluation in its decision to terminate her employment. Taylor was

told that she could try to resolve her concerns directly with CP&L, so she contacted the director of the company's human resources department in January 2002. The director corrected Taylor's performance evaluation but failed to adjust her February 2001 salary increase to reflect the improved evaluation and failed to address any of the other issues Taylor had raised.

Thereafter, on May 9, 2003, Taylor sued Progress in federal court under 29 U.S.C. § 2617, alleging that the company had violated the FMLA by (1) not fully informing her of her FMLA rights, (2) improperly denying her requests for medical leave, (3) terminating her employment because of her medical absences, and (4) terminating her employment because she complained about the company's violations of the FMLA. The complaint sought an injunction directing Progress to rehire Taylor, compensatory damages, liquidated damages, and attorneys' fees and costs. Progress filed a motion for summary judgment, arguing that the release was valid and provided the company a complete defense to Taylor's suit. In response Taylor contended that 29 C.F.R. § 825.220(d) — which provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA" — barred enforcement of the release insofar as her FMLA rights are concerned. At the same time, Taylor moved to amend her complaint to substitute CP&L as a defendant and to add an allegation that CP&L's actions had been willful. The district court granted Progress's motion for summary judgment, holding that § 825.220(d) does not render the release unenforceable. The district court denied as futile

Taylor's motion to amend her complaint, concluding that the release would also bar suit pursuant to the proposed amendment. This appeal followed.

II.

A.

Taylor argues that the district court erred in granting summary judgment to Progress because 29 C.F.R. § 825.220(d) prevents the company from enforcing the release insofar as Taylor's FMLA rights are concerned. The district court, relying on *Faris v. Williams WPCI, Inc.*, 332 F.3d 316 (5th Cir. 2003), held that § 825.220(d) prohibits only the prospective waiver of substantive FMLA rights. Thus, according to the district court, the regulation does not apply to (1) the retrospective waiver or release of FMLA claims or (2) the waiver or release of claims that an employer has discriminated or retaliated against an employee for the exercise of her substantive FMLA rights. The district court's interpretation of the regulation is a legal conclusion that we review de novo. *See United States v. Lofton*, 233 F.3d 313, 317 n.4 (4th Cir. 2000).

We disagree with the district court's interpretation of § 825.220(d). The regulation's plain language prohibits both the retrospective and prospective waiver or release of an employee's FMLA rights. In addition, the regulation applies to all FMLA rights, both substantive and proscriptive (the latter preventing discrimination and retaliation). Finally, the DOL, by recognizing that the FMLA's enforcement scheme is analogous to that of the Fair

Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, has indicated that § 825.220(d) permits the waiver or settlement of FMLA claims only with the prior approval of the DOL or a court. For reasons we discuss more fully below, we conclude that the regulation is based on a permissible construction of the FMLA, and it is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. As a result, we agree with Taylor that § 825.220(d) renders the release unenforceable with respect to her FMLA rights.

B.

As noted above, the FMLA creates both substantive and proscriptive rights. *See Chaffin v. John H. Carter Co.*, 179 F.3d 316, 319 (5th Cir. 1999); *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159-60 & nn.2-4 (1st Cir. 1998); *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712-13 (7th Cir. 1997). The substantive rights include an employee's right to take up to twelve weeks of unpaid leave in any one-year period because of a serious health condition, 29 U.S.C. § 2612(a)(1)(D); the right to take such leave on an intermittent basis, or on a reduced work schedule, when medically necessary, *id.* § 2612(b)(1); and the right to reinstatement following such leave, *id.* § 2614(a)(1). The proscriptive rights include an employee's right not to be discriminated or retaliated against for exercising substantive FMLA rights or for otherwise opposing any practice made unlawful by the Act. *Id.* §§ 2614(a)(2), 2615(a). Taylor's complaint alleges the violation of both types of FMLA rights.

C.

1.

Again, 29 C.F.R. § 825.220(d) states that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." This appeal turns on the proper interpretation of the regulation, and our analysis is controlled by *Chevron*. We therefore begin with *Chevron*'s first step and ask "whether Congress has directly spoken to the precise question" of whether an employee can waive (or whether an employer can induce an employee to waive) her rights under the FMLA. 467 U.S. at 842. "[I]f the statute is silent or ambiguous with respect to [this] specific issue," *id.* at 843, then Congress "has by implication delegated authority to the agency charged with administering the statute" to promulgate regulations to deal with the issue, *United States v. Deaton*, 332 F.3d 698, 708 (4th Cir. 2003). The FMLA neither explicitly provides for nor precludes the waiver or settlement of claims. *See* 29 U.S.C. § 2601 *et seq.* Congress therefore has not spoken directly to this particular issue, but it has charged the Secretary of Labor with the job of administering the FMLA, *see, e.g.*, *id.* §§ 2616, 2617(b), and "prescrib[ing] such regulations as are necessary to carry out" the Act, *id.* § 2654. In accordance with this statutory delegation of rulemaking authority, the Secretary promulgated comprehensive regulations, including 29 C.F.R. § 825.220(d), to implement the FMLA. *See* 29 C.F.R. § 825.100 *et seq.* We thus conclude for purposes of *Chevron*'s step one that Congress has not spoken directly on the issue of whether FMLA rights can be waived and that the Act grants the Secretary (or the DOL) authority to address this issue.

2.

a.

Before proceeding to *Chevron*'s step two, we must resolve the dispute over what § 825.220(d) actually means. *See Deaton*, 332 F.3d at 709. After that, we will be in a position to decide at step two whether the regulation is based on a permissible construction of the statute. *See Chevron*, 467 U.S. at 843. As for § 825.220(d)'s meaning, we conclude that the regulation prohibits both the prospective and retrospective waiver of any FMLA right (whether substantive or proscriptive) unless the waiver has the prior approval of the DOL or a court. This means that § 825.220(d) renders the release unenforceable with respect to Taylor's FMLA claims.

In reaching this conclusion, we first examine § 825.220(d)'s plain language, *see Deaton*, 332 F.3d at 709, which unambiguously prohibits the waiver or release of FMLA claims. The regulation states that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." 29 C.F.R. § 825.220(d). Section 825.220(d) thus regulates the employment relationship by prohibiting any employer-employee agreement that would adjust or eliminate FMLA rights. Moreover, the regulation does not limit itself to precluding only the prospective waiver of FMLA rights. The key word is "waive," and we have found no definition of the word that suggests it has only a prospective connotation. Black's defines "waive" as "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily." Black's Law Dictionary 1611 (8th

ed. 2004). Webster's defines "waive" as "to give up . . .: FORSAKE . . . to withdraw . . . to relinquish voluntarily (as a legal right) . . . to refrain from pressing or enforcing (as a claim or rule) . . . RELINQUISH." Webster's Third New International Dictionary 2570 (2002). Indeed, "waiver" is commonly used to describe the post-dispute settlement or release of claims. *See, e.g., Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426-27 (1998) (discussing that the general statutory prohibition on the waiver of ADEA claims established by the OWBPA applies to the post-dispute settlement or release of such claims).

By the same token, nothing in the text of § 825.220 indicates that the waiver prohibition protects only substantive FMLA rights and not the proscriptive FMLA rights to be free from discrimination and retaliation. Section 825.220 begins with the question, "How are employees protected who request leave *or otherwise assert FMLA rights*?" 29 C.F.R. § 825.220 (emphasis added). The section immediately preceding the anti-waiver provision explicitly recognizes that employers may not discriminate or retaliate against employees who take FMLA leave. *Id.* § 825.220(c) (explaining, for example, that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions"). The regulation therefore recognizes that the FMLA protects a set of rights beyond the substantive right to take twelve weeks of leave, including the proscriptive rights to be free from discrimination and retaliation for the exercise of substantive FMLA rights. Thus, because an employee who seeks redress for an employer's FMLA-related

discrimination or retaliation is "otherwise assert[ing] FMLA rights," *id.* § 825.220, she is asserting "rights under [the] FMLA" that cannot be waived, *id.* § 825.220(d). This accords with the FMLA's statutory text, which affords protection to substantive as well as proscriptive rights. *See supra* part II.B. It is therefore clear that the employee "rights under [the] FMLA" protected by the anti-waiver provision, 29 C.F.R. § 825.220(d), must include both (1) the right to twelve weeks of leave and to reinstatement following that leave (the substantive rights) and (2) the right to be free from FMLA-related discrimination and retaliation (the proscriptive rights).

Section 825.220(d)'s plain meaning is further confirmed by examining what the DOL said it intended the provision to mean at the time the final regulations were published. The DOL specifically considered and rejected proposed amendments that would have reflected the interpretation urged by Progress and adopted by the district court. In the "Summary of Major Comments" published with the final version of the FMLA implementing regulations, the DOL notes the concerns expressed by several large corporations and the U.S. Chamber of Commerce regarding "the 'no waiver of rights' provisions." Preamble to the Final Regulations Implementing the Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995). These business interests "recommended explicit allowance of waivers and releases in connection with [the] settlement of FMLA claims and as part of a severance package (as allowed under Title VII and ADEA claims, for example)." *Id.* In response to these concerns, the DOL explained that it had "given

careful consideration to the comments . . . and . . . concluded that prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the FLSA." *Id.* By rejecting business's suggestion that waivers and releases should be allowed in connection with the post-dispute settlement of FMLA claims, the DOL made clear that § 825.220(d) was never intended to have only prospective application.

The DOL's recognition that the FMLA's enforcement scheme is meant to parallel the FLSA's also indicates that employees may waive or release their FMLA rights with the prior approval of the DOL or a court. *See id.* In accepting the parallel between the FMLA and the FLSA, the DOL recognized that Congress intended for the FMLA to provide employee protections similar to those provided by the FLSA. *See* 29 U.S.C. §§ 216(b)-(c), 2617(a)-(b); *see also infra* part II.C.3. If the DOL had adopted business's recommendation of incorporating Title VII and ADEA rules on waiver into the FMLA regulations, this would have indicated acceptance of an enforcement scheme in which FMLA claims could be settled or released without agency or court approval. The DOL, however, rejected the Title VII/ADEA approach by analogizing the FMLA's enforcement scheme to that of the FLSA. *See* Preamble to the Final Regulations Implementing the Family and Medical Leave Act of 1993, 60 Fed. Reg. at 2218. The rights guaranteed by the FLSA cannot be waived or settled without prior DOL or court approval. *See Barrentine v. Ark.-Best Freight Sys.*,

Inc., 450 U.S. 728, 740, 745 (1981); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114-16 (1946); 29 U.S.C. § 216(b)-(c). Thus, the DOL — "the agency charged with administering" the FMLA, *Deaton*, 332 F.3d at 708 — has acknowledged that Congress intended for the restrictions imposed on the settlement of FLSA claims to be duplicated in the FMLA's regulatory scheme. *See* 29 U.S.C. §§ 216(b)-(c), 2617(a)-(b); *see also infra* part II.C.3.

We therefore hold that, in the absence of prior approval of the DOL or a court, 29 C.F.R. § 825.220(d) bars the waiver of both substantive and proscriptive FMLA rights. This is the case regardless of whether the waiver is executed before or after the employer commits the FMLA violation.

b.

We pause to point out that the district court's reliance on the Fifth Circuit's decision in *Faris* was misplaced. The court in that case asserted that a "plain reading" of § 825.220(d) led to the conclusion that the regulation prohibits the "prospective waiver of [substantive] rights, not the post-dispute settlement of claims" alleging retaliation. *Faris*, 332 F.3d at 321. And while the court in *Faris* did not find it "necessarily dispositive that post-dispute waiver is allowed" under Title VII and the ADEA, the waiver doctrines from those statutes were considered "highly persuasive" because the court could think of "no good reason" to treat FMLA waivers any differently. *Id.* at 321 22. As a result, the *Faris* court (like the district court here) concluded that § 825.220(d)'s prohibition does not apply to (1) the retrospective waiver or

release of FMLA claims or (2) any waiver or release of a claim that an employer has discriminated or retaliated against an employee for exercising her substantive FMLA rights. Again, we conclude that § 825.220(d) plainly prohibits the waiver or release of FMLA claims (unless there is DOL or court approval), and we therefore disagree with the Fifth Circuit's analysis. The definitions and common usage of the verb "waive," the plain meaning and context of § 825.220(d), and the DOL's own understanding of the regulation at the time of its adoption all point to the same conclusion: that § 825.220(d) does not make a distinction between (1) prospective and retrospective waivers or (2) the substantive and proscriptive rights guaranteed to every employee covered by the FMLA. From our discussion above, it is likewise clear that the DOL intended, by noting the parallels between the FMLA and the FLSA, to treat waivers under the FMLA differently from waivers under Title VII and the ADEA. In taking this course, the DOL was simply following the statutory text and congressional intent. *See infra* part II.C.3.

c.

The district court, to support its holding that § 825.220(d) does not bar the release of most FMLA claims, suggested that a contrary ruling would cast doubt on our decision in *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997). In *O'Neil* we held that a general arbitration clause in an employment agreement applied to claims asserted under the FMLA. *Id.* at 273, 276. However, agreeing to submit a claim to arbitration is entirely different from agreeing to waive it. An agreement to arbitrate

preserves the claim; the agreement simply shifts the forum for resolving the claim from a court to an arbitration setting. *O'Neil*, in short, has no bearing on the proper interpretation of § 825.220(d).

d.

In addition to defending the district court's reasoning, Progress argues that summary judgment is appropriate because Taylor ratified the release of her FMLA claims by retaining the consideration she received in exchange for executing the general release. We disagree. Because FMLA claims are not waivable by agreement, neither are they waivable by ratification. *See Bluitt v. Eval Co. of Am.*, 3 F. Supp. 2d 761, 764 n.1 (S.D. Tex. 1998); *see also Oubre*, 522 U.S. at 426 27. Section 825.220(d) provides that "[e]mployees cannot waive . . . their rights under [the] FMLA," and it makes no exception for waiver by ratification. We take no position on the effect our decision today might have on the continuing validity of the release with respect to non-FMLA claims, but we note that the release contains a severability clause. Moreover, in future proceedings the district court "may need to inquire whether the employer has claims for restitution, recoupment, or setoff against the employee." *Oubre*, 522 U.S. at 428. These questions, which "may be complex [if] a release is effective as to some claims but not as to" others, are not before us today. *Id.*

3.

We finally reach the question of whether § 825.220(d) satisfies *Chevron*'s step two; here we ask

whether the regulation is "based on a permissible construction" of the FMLA. 467 U.S. at 843. Congress directed the Secretary of Labor to issue regulations "necessary to carry out" the Act, 29 U.S.C. § 2654, and "[t]he Secretary's judgment that a particular regulation fits within this statutory constraint must be given considerable weight," *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002). Nevertheless, a regulation cannot be upheld if it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

Progress contends that if we conclude (as we just have) that the regulation bars enforcement of the release, then the regulation itself must be deemed unenforceable. First, Progress argues that a regulation barring the waiver or release of claims is inconsistent with the general public policy favoring settlement. Second, Progress argues that congressional silence on the issue of waiver demonstrates an intent not to regulate the waiver or release of FMLA claims. Third, Progress argues that a regulation entirely prohibiting the waiver or release of claims would be arbitrary and therefore invalid under *Chevron*.

Progress's first argument, pressing general public policy concerns, is misplaced because our inquiry under *Chevron*'s step two does not focus on whether the regulatory prohibition of FMLA waivers is advisable as a policy matter. Given the DOL's interpretive regulation, we cannot "simply impose [our] own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron*, 467 U.S. at 843 (footnote

omitted). Rather, we must decide whether 29 C.F.R. § 825.220(d) is "based on a permissible construction" of the FMLA or whether the regulation is instead "manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44. We agree with Progress that there is a general public policy favoring the post-dispute settlement of claims. However, because the FMLA's language, structure, and the congressional intent behind its enactment are clear (as we demonstrate below), the general policy favoring settlement has no place in our *Chevron* step two analysis of whether the DOL's implementing regulations are based on a permissible construction of the statute. *See Cent. Bank v. First Interstate Bank*, 511 U.S. 164, 188 (1994).

We also reject Progress's second argument that Congress's silence on the question of waiver should be interpreted as indicating an intent to allow the waiver or release of FMLA claims. We do so because "inferences from congressional silence, in the context of administrative law, are often treacherous." *EEOC v. Seafarers Int'l Union*, 394 F.3d 197, 202 (4th Cir. 2005) (internal quotation marks omitted); *see also Brown v. Gardner*, 513 U.S. 115, 121 (1994) (casting considerable doubt on using congressional silence to interpret a statute).

As for Progress's third argument — that a complete prohibition on the waiver or release of FMLA claims would be arbitrary — we have already explained that § 825.220(d) allows an employee to waive FMLA rights with the prior approval of the DOL or a court. *See supra* part II.C.2.a. In promulgating the implementing regulations, the DOL explicitly

analogized the FMLA to "other labor standards statutes such as the FLSA." Preamble to the Final Regulations Implementing the Family and Medical Leave Act of 1993, 60 Fed. Reg. at 2218. The agency charged with administering the statute thus concluded that the FMLA was (and was intended to be) more similar to the FLSA than to employment discrimination statutes such as Title VII, and the agency (the DOL) therefore adopted a standard governing FMLA waivers that tracks the standard governing FLSA waivers. The DOL's approach is consistent with congressional intent and the statutory text because Congress indicated that the FMLA was to be implemented in the same way as the FLSA. *See, e.g.*, S. Rep. No. 103-3, at 35 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 37 (explaining that the FMLA's "enforcement scheme is modeled on the enforcement scheme of the FLSA" and that "[t]he relief provided in FMLA also parallels the provisions of the FLSA"); *see also Arban v. W. Publ'g Corp.*, 345 F.3d 390, 407-08 (6th Cir. 2003) (explaining the strong link between the remedial provisions of the FMLA and the FLSA); *Diaz*, 131 F.3d at 712-13 (distinguishing the FMLA from employment discrimination statutes and likening it to other statutes, such as the FLSA, which "set substantive floors").

Again, the Supreme Court has consistently held that the rights guaranteed by the FLSA cannot be waived by private agreement between employer and employee. *See Barrentine*, 450 U.S. at 740, 745; *Gangi*, 328 U.S. at 114-16. Claims for FLSA violations can, of course, be settled when the settlement is supervised by the DOL or a court. The

DOL is statutorily authorized to supervise the settlement of claims for employer violations of §§ 206 and 207 of the FLSA (minimum wage and maximum hour laws), 29 U.S.C. § 216(c), and the FMLA instructs the DOL to "receive, investigate, and attempt to resolve complaints of [FMLA] violations . . . *in the same manner* that the [DOL] receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207" of the FLSA, *id.* § 2617(b)(1) (emphasis added). The DOL "attempts to resolve complaints of violations of [FLSA] sections 206 and 207," *id.*, when it "supervise[s] the payment of . . . unpaid minimum wages or . . . unpaid overtime compensation" under FLSA §§ 206 or 207, a payment which, if accepted by an employee, "constitute[s] a waiver" of the employee's FLSA claim, *id.* § 216(c). Likewise, the DOL "attempt[s] to resolve complaints of [FMLA] violations . . . in the same manner that [it] . . . attempts to resolve complaints of [FLSA] violations," *id.* § 2617(b)(1), when it supervises the settlement of an employee's FMLA claim. In other words, the DOL has *statutory* authority to supervise and approve the settlement and waiver (or release) of FMLA claims. Judicial authority to supervise the settlement of both FLSA and FMLA claims is implicit in both labor standards statutes by virtue of the statutory grant of "Federal or State court" jurisdiction to hear and determine such claims. *Id.* §§ 216(b) (FLSA), 2617(a)(2) (FMLA). Thus, Progress's third argument that 29 C.F.R. § 825.220(d) is arbitrary fails because the regulation must be construed to allow the waiver or release of FMLA claims with prior DOL or court approval.

Moreover, the regulation is entirely consistent with

the statute. The FMLA was enacted to set a minimum labor standard for family and medical leave, *see* 29 U.S.C. § 2601, and was analogized to child labor and occupational safety laws as well as the FLSA, *see* H.R. Rep. No. 103-8, pt. 1, at 21-22 (1993); S. Rep. No. 103-3, at 4-5, *reprinted in* 1993 U.S.C.C.A.N. 3, 6-7. FMLA's minimum standard was justified by a concern that middle- and low-income workers should not be forced to choose between keeping their jobs and quitting to deal with pressing medical or family care needs. *See* 29 U.S.C. § 2601(a)(3); S. Rep. No. 103-3, at 7-12, *reprinted in* 1993 U.S.C.C.A.N. 3, 10-14. Without a minimum leave standard, the "minority of employers who act irresponsibly" could more easily exploit employees at the times when they are most vulnerable. S. Rep. No. 103-3, at 5, *reprinted in* 1993 U.S.C.C.A.N. 3, 7. Moreover, a uniform family and medical leave standard was regarded as necessary because it would "help all businesses maintain a minimum floor of protection for their employees without jeopardizing or decreasing their competitiveness." *Id.* at 18, *reprinted in* 1993 U.S.C.C.A.N. at 20; *see also id.* at 5, *reprinted in* 1993 U.S.C.C.A.N. at 7 ("A central reason that labor standards are necessary is to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly. Federal labor standards take broad societal concerns out of the competitive process so that conscientious employers are not forced to compete with unscrupulous employers."). Section 825.220(d)'s prohibition against the waiver of rights is based on this reasoning. Without the regulation's non-waiver provision, the unscrupulous employer could systematically violate the FMLA and gain a competitive advantage by

buying out FMLA claims at a discounted rate.

In sum, we conclude that § 825.220(d) is "based on a permissible construction" of the FMLA, *Chevron*, 467 U.S. at 843, especially when we consider the Act "as a symmetrical and coherent regulatory scheme" to guarantee family and medical leave to all covered employees, *Ragsdale*, 535 U.S. at 86 (internal quotation marks omitted). The regulation is consistent with the FMLA and must be upheld because it is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

III.

Because the district court did not believe that § 825.220(d) barred the release of Taylor's FMLA claims, the court denied as futile her motion to amend her complaint to substitute CP&L as a defendant and to add an allegation that CP&L's actions were willful. In light of our holding that § 825.220(d) bars enforcement of the release with respect to the waiver of Taylor's FMLA rights, we also hold that the district court's order denying Taylor's motion to amend must be vacated. The motion should be reconsidered on remand.

IV.

We hold that, without prior DOL or court approval, 29 C.F.R. § 825.220(d) bars the prospective and retrospective waiver or release of the FMLA's substantive and proscriptive rights. We therefore reverse the district court's order granting summary judgment to Progress. We also vacate the district court's order denying Taylor's motion to amend her

complaint. The case is remanded for further proceedings.

REVERSED IN PART, VACATED IN PART, AND REMANDED

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA SOUTHERN DIVISION

NO. 7:03-CV-73-H(1)

BARBARA TAYLOR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
PROGRESS ENERGY, INC.,	)	
	)	
Defendant.	)	

This matter is before the court on defendant's motion for summary judgment and plaintiff's motion to amend her complaint. The parties have briefed the issues, and the matter is ripe for adjudication. As explained below, the defendant's motion for summary judgment is granted, and plaintiff's motion to amend is denied.

STATEMENT OF THE CASE

Plaintiff Barbara Taylor is a former employee of Carolina Power & Light Company ("CP&L"). CP&L is a wholly-owned subsidiary of defendant Progress Energy, Inc. ("Progress Energy"). Ms. Taylor worked

for CP&L at the Brunswick Nuclear Plant as a data management assistant.

On May 9, 2003, plaintiff sued Progress Energy for alleged violations of the Family and Medical Leave Act ("FMLA"). On September 22, 2003, Progress Energy filed a motion for summary judgment. On November 17, 2003, plaintiff filed her opposition to the motion for summary judgment. On November 17, 2003, plaintiff also filed a motion to amend her complaint to substitute CP&L as a defendant and to add an allegation that the alleged FMLA violation was "willful." On December 15, 2003, defendant filed a joint reply and response.

STATEMENT OF THE FACTS

In May, 1993, CP&L hired the plaintiff as a document management technical aid. In April 2000, the plaintiff began experiencing pain in her right leg. In late April or early May 2000, the plaintiff's doctor placed the plaintiff on bed rest for five consecutive days due to pain and swelling in plaintiff's right leg. The doctor then ordered more tests in order to determine the cause of the pain and swelling. Taylor Aff. ¶¶ 3-5.

The plaintiff returned to work. She informed the CP&L human resources representative that she had been out of work for five days due to a medical condition and that she would need to be out of work for certain heart tests. Plaintiff contends that she asked about taking FMLA leave, but that the CP&L human resources representative advised her that she did not qualify for FMLA leave. Taylor Aff. ¶ 6.

According to the plaintiff, she continued to miss some work in June, July, and August 2000 due to her medical condition, but CP&L refused to classify the leave as FMLA leave. Taylor Aff. ¶¶ 7-8. In October 2000, plaintiff contends she received a written warning about her attendance. Taylor Aff. ¶ 9. Again in November and December 2000, plaintiff missed work due to her medical condition. Taylor Aff. ¶¶ 10-11.

In February 2001, plaintiff received her 2000 performance evaluation. She received a poor productivity evaluation due to health-related absences, and was told she would only receive a 1% or 2% pay raise. Taylor Aff. ¶ 12.

In March 2001, the CP&L department managers and supervisors informed plaintiff's department that some employees were going to be laid off. The plaintiff was advised that employees would be selected for layoff based on their performance, skills, and knowledge. Taylor Aff. ¶ 13.

Plaintiff was concerned that her 2000 performance review would adversely impact her in connection with a possible lay off. She spoke with an unidentified representative of the United States Department of Labor ("USDOL") and claims she was told that her absences could have qualified for FMLA leave. The unidentified USDOL representative also told plaintiff that FMLA qualified leave cannot be counted against an employee in performance evaluations or in raise determinations. Taylor Aff. ¶ 14.

Plaintiff then spoke with the CP&L human resources department about the information she received from the USDOL. One human resources representative told plaintiff she would look into the matter concerning FMLA leave and get back with her. However, plaintiff never heard back from her. Taylor Aff. ¶ 15. The plaintiff then went back to the original CP&L human resources representative with whom she had been dealing. Plaintiff asked that her time be recoded to reflect FMLA leave, that her performance evaluation be corrected, and that her raise be adjusted. The representative denied these requests. Taylor Aff. ¶ 16.

On May 17, 2001, plaintiff was advised that her employment with CP&L was being terminated pursuant to a reduction in force. Ahearn Aff. ¶ 4; Taylor Aff. ¶ 17. CP&L advised the plaintiff that she was eligible for certain benefits under a CP&L Transition Plan. Specifically, if the plaintiff executed a general release within a 45-day period, then she would receive, among other things, transition pay in the amount of $11,718. Ahearn Aff. ¶ 5. CP&L provided plaintiff a number of documents to review, including a document titled "General Release & Severance Agreement." Taylor Aff. ¶ 17. This release states in part:

> 1. **SEVERANCE**. In consideration for signing this **GENERAL RELEASE**, CP&L agrees to pay Employee severance benefits in accordance with the Carolina Power & Light Amended and Restated Transition Pay and Benefit Plan ("Plan").

2. GENERAL RELEASE OF CLAIMS. IN CONSIDERATION OF SEVERANCE PAYMENTS MADE BY THE COMPANY, EMPLOYEE HEREBY RELEASES CP&L, ITS PARENT, SUBSIDIARIES AND AFFILIATES, AND ITS PAST, PRESENT AND FUTURE PREDECESSORS, SUCCESSORS, ASSIGNS, OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, EMPLOYEE BENEFITS PLANS AND PLAN ADMINISTRATORS FROM ALL CLAIMS AND WAIVES ALL RIGHTS EMPLOYEE MAY HAVE OR CLAIM TO HAVE RELATING TO EMPLOYEE'S EMPLOYMENT WITH CP&L, ITS SUBSIDIARIES AND AFFILIATES, OR EMPLOYEE'S SEPARATION THEREFROM, arising from events which have occurred up to the date Employee executes this General Release, including but not limited to, claims, whether previously known or later discovered, for relief, including but not limited to, front pay, back pay, compensatory damages, punitive damages, injunctive relief, attorneys' fees and costs or any other remedy, arising under: (i) the Age Discrimination in Employment Act of 1967, as amended, ("ADEA"); (ii) the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"); (iii) Title VII of

the Civil Rights Act of 1964, as amended; (iv) the Energy Reorganization Act and Atomic Energy Act, both as amended; (v) the Americans with Disabilities Act ("ADA"); (vi) any wrongful termination claim under any state or federal law (vii) claims for benefits under any employee benefit plan maintained by CP&L related to service credits or other issues; (viii) claims under the Older Workers Benefit Protection Act of 1990 ("OWBPA"); and (ix) any other federal, state or local law. Notwithstanding the above, this **GENERAL RELEASE** shall not apply to claims under the North Carolina Workers' Compensation Act or the South Carolina Workers' Compensation Law.

3. **COVENANT NOT TO SUE.** Employee further agrees not to sue CP&L, its parent, subsidiaries and affiliates, or its past, present or future predecessors, successors, assigns, officers, directors, employees, agents or employee benefit plans or plan administrators on any of the released claims or join as a party with others who may sue on any such claims. . . .

10. **REVIEW PERIOD.** Employee understands that CP&L desires that Employee have adequate time and opportunity to review and understand the consequences of entering into this **GENERAL RELEASE**. Accordingly,

Employee understands that Employee has the right and CP&L encourages Employee: (i) to consult with an attorney prior to executing this **GENERAL RELEASE, and** (ii) that Employee has at least 45 days from the Notification Date stated on the Transition Pay and Benefits Eligibility Notice within which to consider signing it. In the event that Employee does not return and execute a copy of the **GENERAL RELEASE** to CP&L within 45 days from the Notification Date, Employee understands that Employee will not be entitled to the additional transition pay benefits described in the Transition Pay and Benefit Eligibility Notice and Option A of the Amended and Restated Transition Pay and Benefits Plan.

11. **DISCLAIMER OF LIABILITY.** Employee acknowledges that this **GENERAL RELEASE** is intended to avoid all litigation relating to Employee's employment with CP&L and Employee's separation therefrom; therefore, it is not to be considered as CP&L's admission of any liability to Employee – liability which CP&L denies.

12. **ACKNOWLEDEGMENT [sic] OF UNDERSTANDING.** Employee represents that Employee has carefully read the entire **GENERAL RELEASE**, fully understand [sic] its consequences,

> and knowingly and voluntarily enter [sic] into it. Employee further certifies that neither CP&L nor any of its agents, representatives or attorneys have made any representations to Employee concerning the terms or effects of this **GENERAL RELEASE** other than those contained herein.

Release, ¶¶ 1-3, 10-12 (emphasis in original).

The plaintiff executed the Release on June 4, 2001, and returned it to CP&L. On July 20, 2001, CP&L sent the plaintiff a check in the amount of $12,064.97. This check included plaintiff's transition pay of $11,718, plus payment for holiday and vacation pay (less applicable payroll deductions). Ahearn Aff. ¶ 8.

The plaintiff never returned the money that she received. Id. On May 9, 2003, plaintiff sued Progress Energy and alleged that it violated the FMLA by failing to fully inform her of her rights and obligations under the FMLA, denying her request for FMLA leave, and terminating her employment.

ANALYSIS

I. Standard of Review

Summary judgment is appropriate pursuant to Fed. R. Civ. P. 56 when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of

material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the non-moving party may not rest on the allegations or denials in its pleading, Anderson, 477 U.S. at 248, but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Summary judgment is not a vehicle for the court to resolve disputed factual issues. Faircloth v. United States, 837 F. Supp. 123, 125 (E.D.N.C. 1993). Instead, a trial court reviewing a claim at the summary judgment stage should determine whether a genuine issue of material fact exists for trial. Anderson, 477 U.S. at 249. In making this determination, the court must view the evidence and the inferences drawn from the evidence in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam).

II. Analysis of the Release

Defendant contends that plaintiff knowingly and voluntarily waived her rights when she signed the Release. Thus, defendant argues that the Release bars this lawsuit. Plaintiff, however, cites 29 C.F.R. § 825.220(d) for the proposition that her rights under the FMLA are not waivable. Therefore, she argues that the Release fails as a matter of law and is not a bar to this action. Further, plaintiff contends that FMLA rights cannot be waived by ratification and so her retention of the money received pursuant to the Release does not bar her FMLA claim. Finally, plaintiff contends that even if plaintiff's FMLA rights

are waivable, plaintiff did not knowingly and voluntarily waive her FMLA rights when she signed the Release.

A. The FMLA

The FMLA entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a "serious health condition." See 29 U.S.C. § 2612(a)(1)(D). The FMLA includes a certification process that employees generally must follow in order to obtain FMLA leave. 29 U.S.C. § 2613.

The FMLA provides certain substantive rights to eligible employees concerning the length of the leave, the conditions of the leave, and the employee's right upon return from leave. 29 U.S.C. §§ 2612-2614. In addition, section 2615 of the FMLA prohibits certain acts.[1] Section 2617 of the FMLA provides that

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[1] Specifically, Section 1615 is entitled "Prohibited Acts" and states:

a) Interference with rights

1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual–

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

employees may file a civil action against their employers and seek damages and equitable relief for violations of the FMLA. See 29 U.S.C. 2617. The statute of limitations for such an action is two years. See 29 U.S.C. § 2617(c)(1). If the violation is "willful", however, the statute of limitations is three years. See 29 U.S.C. § 2617(c)(2).

The USDOL enforces the FMLA. Congress authorized the Secretary of Labor to issue regulations to carry out the FMLA. 29 U.S.C. § 2654. The Secretary of Labor subsequently enacted regulations concerning the FMLA which are found in 29 C.F.R. § 825.100 et seq.

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(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter. 29 U.S.C. § 1615.

B. 29 C.F.R. 825.220 and the Release

The parties' dispute centers around the meaning of 29 C.F.R. § 825.220(d).[2] Plaintiff quotes the sentence in section 825.220(d) which states, "employees cannot waive, nor may employers induce employees to waive, their rights under the FMLA." Plaintiff then cites Bluitt v. Eval Co., 3 F. Supp.2d 761 (S.D. Tex. 1998), and Dierlam v. Wesley Jessen Corp., 222 F. Supp.2d 1052 (N.D. Ill. 2002), and argues that the waiver of plaintiff's FMLA rights set forth in the Release are unenforceable. In those two cases, each district court interpreted section 825.220(d) to bar enforcement of a general waiver of FMLA rights contained in a Settlement Agreement and General Release between an employer and a former employee. Bluitt, 3 F. Supp.2d at 763; Dierlam, 222 F. Supp.2d at 1055-56.

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[2] Section 825.220 is entitled "How are employees protected who request leave or otherwise assert FMLA rights?" It states in its entirety:

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has –

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;
(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.
(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:
(1) transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;
(2) changing the essential functions of the job in order to preclude the taking of leave;
(3) reducing hours available to work in order to avoid employee eligibility.
(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.
(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (see 825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."

Defendant disagrees and relies on Faris v. Williams WPC-I, Inc., 332 F.3d 316 (5th Cir. 2003). In Faris, the United States Court of Appeals for the Fifth Circuit analyzed section 825.220(d) with respect to the enforceability of a post-termination release that a departing employee signed. The Fifth Circuit held that section 825.220(d) did not bar the enforcement of the release. Id.

The Fifth Circuit noted that the specific context of section 825.220 used the term "employee" to consistently refer to current employees, and not former employees. Id. at 320. In addition, the Fifth Circuit determined that section 825.220 prohibits prospective waiver of substantive rights under the FMLA, but does not affect post-dispute settlement of claims. Id. at 320-21. Finally, the Fifth Circuit noted that its reading of the regulation was "bolstered by public policy favoring enforcement of waivers and our knowledge that similar waivers are allowed in other regulatory contexts." Id. at 321 (collecting cases where courts enforced releases involving a variety of federal employment statutes).

This court is more persuaded by the Fifth Circuit's reasoning in Faris than by the district court opinions in Bluitt and Dierlam. This court agrees with the Fifth Circuit that section 825.220 applies only to an employee's substantive rights under the FMLA. As such it does not preclude the post-dispute

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(e) Individuals, and not merely employees, are protected from retaliation for opposing (e.g., file a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.
29 C.F.R. § 825.220.

settlement of a claim alleging that those substantive rights have been previously violated. What it does preclude is the prospective bargaining away of those substantive rights. For example, if an employer and employee signed a "contract" at the outset of employment in which the employee agreed to waive all of her FMLA rights in exchange for $100, then such a contract would not be enforceable.

Notably, the district court opinions fail to take into account the context of the regulatory scheme in which the disputed language in section 825.220(d) is set out. Bluitt, 3 F. Supp.2d at 763-64; Dierlam, 222 F. Supp.2d at 1055-56. The district court opinions focus on a single sentence in section 825.220(d). In contrast, the Fifth Circuit focused on the entire regulation.

Specifically, the regulation contemplates the employee's "voluntary and uncoerced acceptance" of certain assignments without the employer violating the FMLA. 29 C.F.R. § 825.220(d). Although the example in the regulation relates to a light duty assignment, the regulation's recognition of the ability of an employee to voluntarily accept such an assignment supports the notion that employees may voluntarily waive a claim to seek damages or equitable relief under the FMLA. Moreover, the question posed in the title of 29 C.F.R. § 825.220 (i.e., "How are employees protected who request leave or otherwise assert FMLA rights?") and the text of the entire regulation do not suggest that the USDOL sought to bar all releases of claims for damages or equitable relief. If the USDOL intended to bar all releases of all such claims, it could have used language to make that clear. It did not.

Additionally, the interpretation advanced by plaintiff would render the FMLA unique in the area of federal employment law. As the Fifth Circuit noted, such a reading of the regulation is inconsistent with other federal statutes in which the enforceability of releases of post-dispute federal employment claims has long been recognized. Faris, 332 F.2d at 316, 321-22 (noting that waivers of the right to bring suit under the Age Discrimination in Employment Act ("ADEA") and Title VII claims are enforceable, and observing that there is no good reason to treat FMLA claims differently); see also Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 n.15 (1974) (discussing a knowing and voluntary waiver of a Title VII claim); Adams v. Moore Business Forms, Inc., 224 F.3d 324, 327-30 (4th Cir. 2000) (discussing requirements for valid waivers under the ADEA).

The plaintiff's reading of section 825.220(d) also would cast doubt upon the Fourth Circuit's holding in O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273-76 (4th Cir. 1997). In O'Neil, the plaintiff alleged that her former employer violated the FMLA when it discharged her from employment. The former employee sued. The employer moved to stay the action pending arbitration. The Fourth Circuit enforced an employment agreement in which the employer and employee agreed to submit all employment disputes to arbitration. The arbitration clause did not mention any specific claims that would be subject to arbitration. Nevertheless, the Fourth Circuit rejected the employee's argument that her FMLA claim was not subject to arbitration. Id. Although the Fourth Circuit did not cite section

825.220(d), it is difficult to reconcile plaintiff's proposed reading of section 825.220(d) with the holding in O'Neil.

Finally, serious issues of judicial economy would be raised if the court adopted plaintiff's interpretation of section 825.220(d). Plaintiff's position would eviscerate the ability of parties to settle any FMLA disputes. The plaintiff's interpretation would result in employers being reluctant to offer reasonable settlement amounts because the accompanying releases would be unenforceable. Indeed, it would appear that the only way any FMLA claim could ever be settled would be for the plaintiff to file suit and for the parties to induce the court to sign a consent judgment. This court refuses to adopt that reading of 29 C.F.R. § 825.220. Accordingly, this court need not address defendant's argument that if section 825.220(d) bars all releases of all FMLA claims, then the regulation is invalid under Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984) (explaining that a regulation is invalid if it is "arbitrary, capricious, or manifestly contrary to the statute"); Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 86 (2002) (quoting the Chevron standard in invalidating a regulation promulgated under the FMLA).

C. The validity of the release

Having determined that the release is not invalid under 29 C.F.R. § 825.220, this court must now address whether the release was knowing and voluntary. Plaintiff asserts that this court should evaluate the enforceability of Release under a

"totality of the circumstances" test, citing Melanson v. Browning-Ferris Indus., 281 F.3d 272, 276 (1st Cir. 2002). Plaintiff further argues that the waiver was not knowing or voluntary.

As the defendant correctly notes, the Fourth Circuit has rejected the "totality of the circumstances" test. Instead, the enforceability of a release of a federal employment discrimination claim is analyzed "under ordinary contract principles." O'Shea v. Commercial Credit Corp., 930 F.2d 358, 362 (4th Cir. 1991); see also Kendall v. City of Chesapeake, Va., 174 F.3d 437, 441 n.1 (4th Cir. 1999) (observing that the rationale of O'Shea remains valid despite the overturning of its precise holding by subsequent congressional changes to the ADEA).

North Carolina contract principles apply. Under North Carolina law, a "general release" releases all claims between the parties. "Under our law a comprehensively phrased 'general release,' in the absence of proof of a contrary intent, is usually held to discharge all and sundry claims between the parties." McGladrey, Hendrickson & Pullen v. Syntek Finance Corp., 92 N.C. App. 708, 710-11, 375 S.E.2d 689, 691 (1989) (citing Merrimon v. The Postal Telegraph-Cable Co., 207 N.C. 101, 176 S.E. 246 (1934)). Such a release "is subject to avoidance by a showing that its execution resulted from fraud or mutual mistake." Sykes v. Keiltex Indus., 123 N.C. App. 482, 485, 473 S.E.2d 341, 344 (1996).

Plaintiff has not alleged fraud or facts which could in any way constitute fraud. As for mutual mistake, a "mutual mistake" is a "mistake common to all the parties to a written instrument." Id. at 486,

473 S.E.2d at 344 (citation omitted). Here plaintiff has only provided evidence that she was mistaken about the effect of the release, not the defendant. Taylor Aff. ¶¶ 19-22. Such evidence is insufficient to establish a mutual mistake. Sykes, 123 N.C. App. 486-87, 473 S.E.2d at 344.

In any event, even if this court were to apply the "totality of the circumstances" test to the Release, it would be enforceable. Plaintiff's affidavit makes clear that she was aware of a potential FMLA dispute with defendant before signing this release. See Taylor Aff. ¶¶ 14-16 (plaintiff discussed her FMLA rights with representatives of USDOL and CP&L human resources). Given the breadth of the language in the Release and that the Release states that the plaintiff was advised to consult with an attorney, plaintiff has not produced evidence which raises a genuine issue of material fact as to whether the Release was knowing and voluntary. Accordingly, the defendant's motion for summary judgment is granted.

III. The Motion to Amend

The plaintiff has moved to amend her complaint to substitute CP&L as a defendant and to add an allegation that CP&L's violation of the FMLA was "willful." Generally, under Fed. R. Civ. P. 15(a), a trial court should grant a motion to amend where justice so requires. Foman v. Davis, 371 U.S. 178, 182 (1962). A trial court, however, does have the discretion to deny a motion to amend where the amendment would be futile. Id.; see also New Beckley Mining Corp. v. International Union, 18 F.3d 1161, 1164 (4th Cir. 1994). In considering whether a motion to amend is futile, a court applies the same standard

that it applies in considering a motion to dismiss under Rule (12)(b)(6). Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 974 F.2d 502, 506 (4th Cir. 1992) (denying motion to amend; claims in proposed amended complaint failed to state a claim because they were barred by the applicable statute of limitations).

Given the breadth of the Release, the plaintiff's motion to amend is futile. Even if CP&L were substituted as a defendant, the Release would bar the claim against CP&L. Accordingly, the motion to amend is denied.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment is GRANTED and the plaintiff's motion to amend her complaint is DENIED. The clerk is directed to close this case.

This 22 day of March, 2004.

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MALCOLM J. HOWARD

United States District Judge

At Greenville, NC

JD

APPENDIX D

FILED: August 24, 2007

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1525
(CA-03-73-7-H)

BARBARA TAYLOR,

Plaintiff - Appellant,

versus

PROGRESS ENERGY, INCORPORATED,

Defendant - Appellee.

NATIONAL EMPLOYMENT LAWYERS' ASSOCIATION; NORTH CAROLINA ACADEMY OF TRIAL LAWYERS;

Amici Supporting Appellant,

EQUAL EMPLOYMENT ADVISORY COUNCIL; SOCIETY FOR HUMAN RESOURCE MANAGEMENT; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; ELAINE CHAO, Secretary of Labor,

Amici Supporting Appellee,

ORDER

Appellee has filed a petition for rehearing en banc of this court's decision of July 3, 2007. Appellant has filed an answer in opposition.

The Court grants amici motions for leave to file briefs in response to the petition for rehearing en banc and accepts the proposed briefs. As no poll was requested on the petition for rehearing en banc, the Court denies the petition.

Entered at the direction of Judge Michael with the concurrence of Judge Duncan and Judge Payne.

For the Court

/s/ Patricia S. Connor

Clerk

APPENDIX E

FILED: June 14, 2006

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1525
(CA-03-73-7-H)

BARBARA TAYLOR,

Plaintiff - Appellant,

versus

PROGRESS ENERGY, INCORPORATED,

Defendant - Appellee.

NATIONAL EMPLOYMENT LAWYERS' ASSOCIATION; NORTH CAROLINA ACADEMY OF TRIAL LAWYERS;

Amici Supporting Appellant,

EQUAL EMPLOYMENT ADVISORY COUNCIL; SOCIETY FOR HUMAN RESOURCE MANAGEMENT; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA;

Amici Curiae,

ELAINE CHAO, Secretary of Labor,

Amicus Supporting Appellee.

ORDER

Appellee has filed a petition for rehearing en banc of this court's decision of July 20, 2005. Appellant has filed an answer.

As no poll was requested on the petition for rehearing en banc, the court denies the petition. (Judge Widener, being disqualified, did not participate in any consideration of the petition.)

Panel rehearing of this case is granted at the direction of the court. The original judgment and opinion of the court are vacated.

Entered at the direction of Judge Michael with the concurrence of Judge Duncan and Judge Payne.

For the Court

/s/ Patricia S. Connor

Clerk

APPENDIX F

THE FAMILY AND MEDICAL LEAVE ACT
29 USCS §§ 2601; 2611-2612; 2614-2617; 2654

TITLE 29. LABOR
CHAPTER 28. FAMILY AND MEDICAL LEAVE

§ 2601. Findings and purposes

(a) Findings. Congress finds that--

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes. It is the purpose of this Act--

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment [USCS, Constitution, Amendment 14, § 1] minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

§ 2611. Definitions

As used in this title [29 USCS § § 2611 et seq.]:

(1) Commerce. The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct

commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 501 of the Labor Management Relations Act, 1947 (29 U.S.C. 142 (1) and (3)).

(2) Eligible employee.

(A) In general. The term "eligible employee" means an employee who has been employed--

(i) for at least 12 months by the employer with respect to whom leave is requested under section 102 [29 USCS § 2612]; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions. The term "eligible employee" does not include--

(i) any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code [5 USCS § § 6381 et seq.] (as added by title II of this Act); or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) Determination. For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) shall apply.

(3) Employ; employee; State. The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203 (c), (e), and (g)).

(4) Employer.

(A) In general. The term "employer"--

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes--

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)); and

(iv) includes the General Accounting Office [Government Accountability Office] and the Library of Congress.

(B) Public agency. For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(5) Employment benefits. The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)).

(6) Health care provider. The term "health care provider" means-

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) Parent. The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

(8) Person. The term "person" has the same meaning given such term in section 3(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(a)).

(9) Reduced leave schedule. The term "reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

(10) Secretary. The term "Secretary" means the Secretary of Labor.

(11) Serious health condition. The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves--

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(12) Son or daughter. The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is-

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(13) Spouse. The term "spouse" means a husband or wife, as the case may be.

§ 2612. Leave requirement

(a) In general.

(1) Entitlement to leave. Subject to section 103 [29 USCS § 2613], an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) Expiration of entitlement. The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b) Leave taken intermittently or on a reduced leave schedule.

(1) In general. Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave

schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and section 103(b)(5) [29 USCS § 2613(b)(5)], leave under subparagraph (C) or (D) of subsection (a)(1) may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) beyond the amount of leave actually taken.

(2) Alternative position. If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1), that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that--

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted. Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)), the compliance of an employer with this title [29 USCS § § 2611 et seq.] by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave.

(1) Unpaid leave. If an employer provides paid

leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this title [29 USCS § § 2611 et seq.] may be provided without compensation.

(2) Substitution of paid leave.

(A) In general. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided

under subparagraph (A), (B), or (C) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection, except that nothing in this title [29 USCS § § 2611 et seq.] shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(c) Foreseeable leave.

(1) Requirement of notice. In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30

days, the employee shall provide such notice as is practicable.

(2) Duties of employee. In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment, the employee--

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) Spouses employed by the same employer. In any case in which a husband and wife entitled to leave under subsection (a) are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken--

(1) under subparagraph (A) or (B) of subsection (a)(1); or

(2) to care for a sick parent under subparagraph (C) of such subsection.

§ 2614. Employment and benefits protection

(a) Restoration to position.

(1) In general. Except as provided in

subsection (b), any eligible employee who takes leave under section 102 [29 USCS § 2612] for the intended purpose of the leave shall be entitled, on return from such leave--

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits. The taking of leave under section 102 [29 USCS § 2612] shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations. Nothing in this section shall be construed to entitle any restored employee to--

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification. As a condition of restoration under paragraph (1) for an employee who has taken leave under section 102(a)(1)(D) [29 USCS § 2612(a)(1)(D)], the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction. Nothing in this subsection shall be construed to prohibit an employer from

requiring an employee on leave under section 102 [29 USCS § 2612] to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees.

(1) Denial of restoration. An employer may deny restoration under subsection (a) to any eligible employee described in paragraph (2) if--

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees. An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits.

(1) Coverage. Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 102 [29 USCS § 2612], the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986 [26 USCS § 5000(b)(1)]) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in

employment continuously for the duration of such leave.

(2) Failure to return from leave. The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 102 [29 USCS § 2612] if--

(A) the employee fails to return from leave under section 102 [29 USCS § 2612] after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than--

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 102(a)(1) [29 USCS § 2612(a)(1)]; or

(ii) other circumstances beyond the control of the employee.

(3) Certification.

(A) Issuance. An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by-

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 102(a)(1)(C) [29 USCS § 2612(a)(1)(C)]; or

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 102(a)(1)(D) [29 USCS §

2612(a)(1)(D)].

(B) Copy. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification.

(i) Leave due to serious health condition of employee. The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member. The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

§ 2615. Prohibited acts

(a) Interference with rights.

(1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title [29 USCS § § 2611 et seq.].

(2) Discrimination. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title [29 USCS § § 2611 et seq.].

(b) Interference with proceedings or inquiries. It shall be unlawful for any person to discharge or in any other manner discriminate against any

individual because such individual--

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title [29 USCS § § 2611 et seq.];

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title [29 USCS § § 2611 et seq.]; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title [29 USCS § § 2611 et seq.].

§ 2616. Investigative authority

(a) In general. To ensure compliance with the provisions of this title [29 USCS § § 2611 et seq.], or any regulation or order issued under this title [29 USCS § § 2611 et seq.], the Secretary shall have, subject to subsection (c), the investigative authority provided under section 11(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(a)).

(b) Obligation to keep and preserve records. Any employer shall make, keep, and preserve records pertaining to compliance with this title [29 USCS § § 2611 et seq.] in accordance with section 11(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(c)) and in accordance with regulations issued by the Secretary.

(c) Required submissions generally limited to an annual basis. The Secretary shall not under the authority of this section require any employer or any plan, fund, or program to submit to the Secretary any books or records more than once during any 12-month period, unless the Secretary has reasonable cause to believe there may exist a violation of this

title [29 USCS § § 2611 et seq.] or any regulation or order issued pursuant to this title [29 USCS § § 2611 et seq.], or is investigating a charge pursuant to section 107(b) [29 USCS § 2617(b)].

(d) Subpoena powers. For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 9 of the Fair Labor Standards Act of 1938 (29 U.S.C. 209).

§ 2617. Enforcement

(a) Civil action by employees.

(1) Liability. Any employer who violates section 105 [29 USCS § 2615] shall be liable to any eligible employee affected--

(A) for damages equal to--

(i) the amount of--

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 105 [29 USCS § 2615] proves to the satisfaction of

the court that the act or omission which violated section 105 [29 USCS § 2615] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 105 [29 USCS § 2615], such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) Right of action. An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of--

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and costs. The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) Limitations. The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate--

(A) on the filing of a complaint by the Secretary in an action under subsection (d) in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the

Secretary in an action under subsection (b) in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1), unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

(b) Action by the Secretary.

(1) Administrative action. The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 105 in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 6 and 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 and 207).

(2) Civil action. The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a)(1)(A).

(3) Sums recovered. Any sums recovered by the Secretary pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) Limitation.

(1) In general. Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(2) Willful violation. In the case of such action brought for a willful violation of section 105 [29 USCS § 2615], such action may be brought within 3

years of the date of the last event constituting the alleged violation for which such action is brought.

(3) Commencement. In determining when an action is commenced by the Secretary under this section for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.

(d) Action for injunction by Secretary. The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary--

(1) to restrain violations of section 105 [29 USCS § 2615], including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or

(2) to award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(e) Solicitor of Labor. The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under this section.

(f) General Accounting Office [Government Accountability Office] and Library of Congress. In the case of the General Accounting Office [Government Accountability Office] and the Library of Congress, the authority of the Secretary of Labor under this title [29 USCS § § 2611 et seq.] shall be exercised respectively by the Comptroller General of the United States and the Librarian of Congress.

§ 2654. Regulations

The Secretary of Labor shall prescribe such

regulations as are necessary to carry out title I and this title [29 USCS § § 2611 et seq., 2651 et seq.] not later than 120 days after the date of the enactment of this Act [Feb. 5, 1993]

APPENDIX G

29 CFR 825.220

§ 825.220 How are employees protected who request leave or otherwise assert FMLA rights?

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has--

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act.

"Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) changing the essential functions of the job in order to preclude the taking of leave;

(3) reducing hours available to work in order to avoid employee eligibility.

(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a ``light duty" assignment while recovering from a serious health

condition (see Sec. 825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."

(e) Individuals, and not merely employees, are protected from retaliation for opposing (e.g., file a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

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No. 07-539

IN THE
Supreme Court of the United States

PROGRESS ENERGY, INC.,

Petitioner,

v.

BARBARA TAYLOR,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Circuit correctly concluded that the plain language of 29 C.F.R. § 825.220(d), which provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA," precludes the unsupervised waiver of all FMLA rights, including substantive, proscriptive and remedial rights, and that the Department of Labor's recent interpretation is inconsistent with the regulation.

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STATEMENT OF THE CASE

1. **The Statutory and Regulatory Scheme.** Congress enacted the Family and Medical Leave Act of 1993 ("FMLA"), 107 Stat. 6, 29 U.S.C. § 2601 *et seq.* in response to growing concerns about "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(4); *see* S. Rep. No. 103-3, at 11-12, reprinted in 1993 U.S.C.C.A.N. 3, 13-14 (noting that "job loss because of illness has a particularly devastating effect on workers who support themselves and on families where two incomes are necessary to make ends meet or where a single parent heads the household"). Indeed, it is an express purpose of the statute to "entitle employees to take reasonable leave for medical reasons . . . in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(2)-(3); *see also Hukill v. Auto Care, Inc.*, 192 F.3d 437, 441 (4th Cir. 1999) (describing the purpose of the FMLA to "balance the demands of the workplace with the needs of employees to take leave for eligible medical conditions and compelling family reasons."), *cert. denied*, 529 U.S. 1116 (2000).

The FMLA provides three categories of rights. The substantive rights include an employee's right to receive up to twelve weeks of unpaid leave for a serious health condition, 29 U.S.C. § 2612(a)(1), and the right to reinstatement following the leave, *id.* § 2614(a)(1). Other substantive rights include the continuation of employment benefits, *id.* § 2614(a)(2), the maintenance of the employee's group health coverage, *id.* § 2614(c)(1), and the

availability of intermittent leave, *id.* § 2612(b)(1). Additionally, "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under 'no fault' attendance policies." 29 C.F.R. § 825.220(c).

The proscriptive rights include an employee's right not to be discriminated against or retaliated against for exercising FMLA rights. *Id.* § 2615(a)(2); *see Morgan v. Hilti*, 108 F.3d 1319, 1325 (10th Cir. 1997).

The FMLA also provides employees with a third category of rights, a private right of action to recover both equitable relief and money damages against an employer who interferes with an employee's exercise of any rights under the Act, or discriminates or retaliates against an employee's exercise of any rights under the Act. 29 U.S.C. § 2615(a)(1), (2); § 2617(a)(1), (2); *see Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003).

2. **Factual Background.** Respondent Barbara Taylor was hired by CP&L, Petitioner's wholly owned subsidiary, as a document management technical aide in 1993. Pet. App. 23a. In April 2000, Mrs. Taylor began experiencing extreme pain and swelling in her right leg. *Id.* Mrs. Taylor's doctor took her out of work for five (5) consecutive days due to increasing pain and swelling. *Id.* Mrs. Taylor's doctor informed her that she needed to undergo a number of medical tests in an effort to determine the cause of the pain and swelling in her leg. *Id.*

When Mrs. Taylor returned to work she went to CP&L's human resources department to inquire about leave options available to her as a result of her medical problems. *Id.* The human resource representative told her that she did not qualify for FMLA leave. *Id.*

During the months of June and July, Mrs. Taylor was out of work a number of days for medical testing and treatment, including a heart test. *Id.* When Mrs. Taylor inquired about FMLA leave a second time, she was again told that she did not qualify. *Id.*

In August 2000, Mrs. Taylor underwent another procedure for the purpose of determining the cause of the extreme pain and swelling in her leg. *Id.* As a result of complications with the procedure, Mrs. Taylor was out of work for five (5) consecutive days and several additional days during the weeks following the procedure. *Id.* In October 2000, Mrs. Taylor received a written warning from her supervisor and the human resource representative stating that she had exceeded the company's average sick time. *Id.* at 23a-24a. When Mrs. Taylor asked about options for handling her health-related absences she was told that she needed to improve her attendance. *Id.* at 24a.

In November 2000, Mrs. Taylor underwent additional medical tests that kept her out of work for five (5) consecutive days. *Id.* During this testing her doctor determined that an abdominal mass was causing the pain and swelling in her leg. *Id.* Her doctor told her that she needed to have the mass removed as soon as possible. *Id.* When Mrs. Taylor returned to work she informed the human resource

representative of her test results. *Id.* When Mrs. Taylor asked if her leave qualified as FMLA leave, Mrs. Taylor was again told that this leave did not qualify as FMLA leave because she had not been out for more than five (5) consecutive days. *Id.*

In December 2000, Mrs. Taylor had surgery to remove the abdominal mass. *Id.* Mrs. Taylor was out of work for approximately six weeks and was told that her leave qualified as FMLA leave and would be designated as such. *Id.* Mrs. Taylor discovered later that only four (4) of the six (6) weeks of leave were designated as FMLA leave. *Id.*

In February 2001, Mrs. Taylor received her 2000 performance evaluation. *Id.* She received a poor productivity evaluation because of her health-related absences. *Id.* Mrs. Taylor was also told by her supervisor that because of her health-related absences she would be receiving only a one percent salary increase, while the average raise given was six percent. *Id.*

In March 2001, Mrs. Taylor learned that the company planned to lay off some employees and that workers would be selected based in part on performance. *Id.* Concerned that her 2000 performance review included a poor productivity evaluation because of her health-related absences, Mrs. Taylor contacted the U.S. Department of Labor ("DOL"). *Id.* She was told that all of her health-related medical leave in 2000 could have qualified for leave under the FMLA. *Id.* Mrs. Taylor was also told that FMLA qualified leave cannot be counted against an employee in performance evaluations and in raise determinations. *Id.* at 24a-25a.

After speaking with the DOL representative, Mrs. Taylor, in an effort to save her job, asked human resources on several occasions to correct her 2000 performance evaluation. *Id.* at 25a. Her request was denied. *Id.* Less than two weeks later, in May 2001, Mrs. Taylor was told that her employment was being terminated. *Id.*

After being informed that she was losing her job of more than eight years, Mrs. Taylor was advised by CP&L that she could receive $11,718 in transition pay[1] if she signed a general release, which stated in part that "EMPLOYEE HEREBY RELEASES [Petitioner and its affiliates] . . . FROM ALL CLAIMS AND WAIVES ALL RIGHTS . . . ." Pet. App. 25a-26a. (emphasis in original). While the general release identified specific laws Mrs. Taylor would be waiving her rights to enforce, the release did not state nor was Mrs. Taylor informed that she was waiving her right to pursue a claim under the FMLA, Pet. App. 49a-50a, despite the fact that CP&L was aware of Mrs. Taylor's belief that it had violated the FMLA with respect to Mrs. Taylor's health-related absences, Pet. App. 25a. Finding herself without employment, Mrs. Taylor signed the release. *Id.*

Following her termination, Mrs. Taylor again contacted the U.S. Department of Labor concerning CP&L's failure to designate all of her health-

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[1] In calculating Mrs. Taylor's transition pay, CP&L used Mrs. Taylor's salary which reflected a one percent, instead of a six percent, increase because CP&L used Mrs. Taylor's health-related absences against her in determining her raise amount. *See* Pet App. 24a-25a.

related absences as FMLA leave. Pet. App. 26a-27a. Mrs. Taylor was informed that she could attempt to resolve the matter directly with CP&L. *Id.* Mrs. Taylor contacted the director of the human resource department to discuss the matter. *Id.* at 27a. The director corrected Mrs. Taylor's 2000 evaluation by removing the low productivity evaluation, but failed to reinstate Mrs. Taylor, adjust her raise, or even adjust her severance payment, which was based on Mrs. Taylor's improperly determined salary. *Id.*

3. **Legal Proceedings Below.** After CP&L failed to address Mrs. Taylor's concerns about her raise, salary and severance payment, Mrs. Taylor filed a complaint against Petitioner based on its subsidiary's many alleged FMLA violations including, *inter alia*, CP&L (1) failing to fully inform Mrs. Taylor of her rights and obligations under the FMLA; (2) improperly denying Mrs. Taylor's request for FMLA leave; (3) failing to designate Mrs. Taylor's health-related absences as FMLA leave; (4) selecting Mrs. Taylor for termination based on her FMLA-qualifying medical absences; and (5) selecting Mrs. Taylor for termination in retaliation for Mrs. Taylor complaining about CP&L's violations of the FMLA. Pet. App. 27a. Petitioner filed an Answer and a Motion for Summary Judgment. *Id.* In its Motion for Summary Judgment, Progress argued that Mrs. Taylor was barred from filing this action because Mrs. Taylor signed a general release on June 4, 2001. *Id.* In response, Mrs. Taylor argued, *inter alia*, that the FMLA rights which Mrs. Taylor was seeking to enforce cannot be waived or released pursuant to 29 C.F.R. § 825.220(d). *Id.*

The trial court, adopting the reasoning of the Fifth Circuit decision *Faris v. Williams WPC-1, Inc.*, 332 F.3d 316 (5th Cir. 2003), held that section 825.220(d) only bars the prospective (future) waiver of substantive rights and not the retrospective (after the fact) release of claims. Pet. App. 53a-65a. As a result, the district court granted Progress's Motion for Summary Judgment concluding that Section 825.220(d) did not invalidate the release and the release was not otherwise invalid. *Id.*

On appeal to the Fourth Circuit Court of Appeals, the court unanimously reversed the district court, holding that the release signed by Mrs. Taylor was not enforceable with regard to her FMLA claims because the plain language of the regulation, section 825.220(d), prohibits both the prospective and retrospective waiver of FMLA rights and claims unless the waiver is approved by the DOL or a court. Pet. App. 28a-44a.

The Fourth Circuit granted the employer's petition for rehearing and allowed the DOL to file an *Amicus* brief and present oral arguments in support of the employer's position that section 825.220(d) only prohibits the prospective, but not the retrospective, waiver of rights. Pet. App. 3a.

On rehearing, a divided panel rejected the DOL's interpretation of the regulation and again held that the regulation prohibits both the prospective and retrospective waiver of FMLA rights "including the right of action (or claim) for a past violation of the Act." Pet. App. 3a-20a.

The Fourth Circuit denied Progress's Petition for Rehearing *En Banc* on August 24, 2007, and

denied its Motion to Stay the Mandate on September 6, 2007.

REASONS FOR DENYING THE WRIT

I. The Case Law Addressing the Key Issues Present in this Case is Sparse and Undeveloped.

Section 825.220(d) provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." Besides the Fourth Circuit, only one other court of appeals, the Fifth Circuit, has interpreted this provision. *See Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). *Faris* involved an employee who alleged she was terminated in retaliation for asserting her FMLA rights. Prior to filing her lawsuit, Faris had signed a release, which did not specifically mention the FMLA, but provided that Faris was waiving her rights to "all other claims arising under any federal, state or local law or regulation." *Faris*, 332 F.3d at 318. Thus, the only issue to be resolved by the Fifth Circuit was whether section 825.220(d) prohibits the waiver of an employee's right to bring a retaliation claim pursuant to 29 U.S.C. § 2615(a)(2). *Id.* at 320-21.

In addressing this single issue, the Fifth Circuit distinguished FMLA substantive rights and FMLA proscriptive rights (which include the right to be free from retaliation), and concluded that the phrase "rights under FMLA" as used in section 825.220(d) was in reference to the substantive FMLA rights only, and did not incorporate proscriptive or retaliation rights. *Id.* Based on this conclusion, the Fifth Circuit held the regulation did

not prohibit Faris's waiver of her proscriptive rights, and thus the release signed by Faris barred her from bringing her retaliation claim.[2] *Id.*

While the present case includes a claim of retaliation, the majority of Mrs. Taylor's claims are based on violation of Mrs. Taylor's *substantive* rights:

- Mrs. Taylor's right to be fully inform of her rights and obligations under the FMLA, 29 U.S.C. § 2615(a)(1);
- Mrs. Taylor's right not to have her FMLA-qualifying leave request improperly denied, 29 U.S.C. § 2612(b)(1);
- Mrs. Taylor's right not to have her FMLA-qualifying leave counted against her in raise determinations, 29 C.F.R. § 825.220(c);
- Mrs. Taylor's right not to be fired based on a poor productivity rating which was based on FMLA-qualifying, 29 C.F.R. § 825.220(c).

No other court of appeals has addressed section 825.220(d) in the context of the waiver of substantive rights, and an individual's right to bring an action under section 2615(a)(1) based on violation of a substantive right.[3] Additionally, no other court of

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[2] It bears noting that the DOL disagrees with the Fifth Circuit's conclusion that "rights under FMLA" as used in 825.220(d) is limited to only substantive rights. Pet. App. 7a.

[3] After making the substantive-retaliation distinction and stating that "[s]everal factors support the interpretation that this regulation applies only to waiver of *substantive rights* under the statute, such as rights to leave, reinstatement, etc., rather than to a cause of action for *retaliation* for the exercise

(*Footnote continued*)

appeals has reviewed DOL's interpretation of 825.220(d), as DOL first articulated its interpretation – that 825.220(d) prohibits only the prospective waiver of FMLA rights – in this action.

Consideration of the issues presented in this case by other court of appeals would provide more developed case law and make for a more meaningful review by this Court, if such review is deemed necessary.[4]

Contrary to the suggestion of Progress and its *Amici*, a decision by this Court to allowing the case law to develop in this area before addressing the issue, will not have a devastating effect on employers. Progress states that the court of appeals decision "saddles [DOL] and the federal courts with a new, judicially minted obligation to superintend potentially tens of thousands of private releases and settlements in FMLA cases each year . . . ." Pet. Br. at 8. However, Progress overstates the likely

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of those rights," *Faris*, 332 F.3d at 320, the Fifth Circuit concluded without clear explanation that section 825.220(d) prohibits only the *prospective* waiver of substantive rights. *Id.* at 321. However, that language is mere dictum because that issue was not before the court or the basis for the court's conclusion that the regulation did not prohibit the waiver of Faris' right to bring a retaliation claim.

[4] The DOL issued a Request for Information (RFI) on December 1, 2006, requesting information regarding, *inter alia*, employee's waiver of FMLA rights pursuant to 825.220(d), Request for Information on the Family and Medical Leave Act of 1993, 71 Fed.Reg. 69504, 69509-10 (Dec. 1, 2006), suggesting that the DOL may be preparing to take steps to formally amend the regulation.

increase of supervised FMLA settlements and the real impact of the Fourth Circuit's decision on employers.

In its supplemental brief filed during the Fourth Circuit review of this case, Progress acknowledged that

> when employers and employees enter into severance or settlement agreements, they rarely seek DOL approval of the release of [Fair Labor Standards Act] claims because the risk exposure from unreleased minimum wage and overtime compensation claims is limited and employers can identify those situations in which significant liability risks are present and limit their approval request to such situations.

Appellee C.A. Supplemental Br. 11

Like Fair Labor Standards Act ("FLSA") claims, employers are also able to identify those situations in which significant FMLA liability risks are present. Not every employee is eligible for FMLA. Not every eligible employee requires or seeks FMLA leave. Not every employee who seeks FMLA leave is denied the requested leave. Thus, employer should not have a difficult time identifying those situations where a risk of FMLA liability exists.

Moreover, the potential risk of a FMLA violation by an employer is *far less* then the potential risk of a FLSA violation. Indeed, the DOL's enforcement numbers bear this out. In fiscal year 2005, the Wage and Hour Division of the Department of Labor collected more than $166 million in back wages for 241,379 employees. 2005 Statistics Fact Sheet,

"Wage and Hour Collects $166 Million In back Wages for over 241,000 Employees in Fiscal Year 2005," http://www.dol.gov/esa/whd/statistics (July 30, 2006). Of those employees, more than 219,000 were employees with minimum wage and overtime back wage violations. *Id.* In contrast, only 1,626 of the 241,379 employees who received back wages had FMLA violation cases. *Id.*

While the number of overall investigations and back wages collected increased in the following year, the number of FMLA-related claims decreased. In fiscal year 2006, the Wage and Hour Division collected more than $171 million in back wages for 246,000 employees. 2006 Statistics Fact Sheet, "Wage and Hour Collects $172 Million in Back Wages for over 246,000 Employees in Fiscal Year 2006," http://www.dol.gov/esa/whd/statistics (December, 2006). Of those employees, more than 222,000 were employees with minimum wage and overtime back wage violations. *Id.* In contrast, only 1,200 of the 246,000 employees who received back wages had FMLA violation cases. *Id.* DOL noted that "[t]he number of [FMLA] complaint investigations concluded in fiscal year 2006 declined slightly from investigations concluded in fiscal year 2005. The number of violation cases declined by 19 percent from the number in fiscal year 2005, and over 26 percent fewer employees were affected by FMLA violations." *Id.*

Based on these enforcement numbers, employers have a *much greater* risk of violating the FLSA than violating FMLA. Additionally, despite the Petitioner's alleged egregious FMLA violations in this

case, DOL's enforcement numbers suggest that the majority of employers are complying with the FMLA and are not exposing themselves to increased risks of FMLA liability.

Because of the low risk of FMLA liability and the employers' ability to identify those situations where risk of liability exists, employers will continue to handle severance and settlement agreements as they have in the past, i.e., seeking DOL or court approval only in those *rare instances* where significant FLSA or FMLA liability exists.

Additionally, both the courts and the DOL are equipped to handle requests for approval when such approval is required because both entities have processes in place by which to supervise settlements of FMLA claims. With respect to the DOL, the Secretary supervises FMLA settlements in the same manner as the Secretary supervises settlements under the FLSA. 29 U.S.C. § 2617(b) (directing the DOL to resolve FMLA complaints in the same manner it resolves complaints under the FLSA – in accordance with 29 U.S.C. § 216).

Accordingly, DOL has the authority to resolve FMLA disputes and supervise binding settlements of FMLA claims and waivers of FMLA rights. With respect to the courts, where a FMLA case is pending before the court, the court may approve settlements in the same manner as it approves FLSA settlements.

II. The Court of Appeals Correctly Held that Section 825.220(d) Prohibits the Waiver of Respondent's FMLA Rights in this Case.

In a well-reasoned decision, the Fourth Circuit correctly held that section 825.220(d) prohibits the waiver of all of Respondent's FMLA rights (substantive, proscriptive, and remedial) and is not limited to only prospective waivers of these rights. Pet. App. 3a.

Looking to the plain language of the regulation, the court of appeals concluded that the phrase "rights under FMLA" includes no limitations regarding the specific rights under FMLA and includes no limitations regarding prospective or retrospective waivers. Pet. App. 4a-5a. Despite DOL's claim that section 220(d) only prohibits the *prospective* waiver of *substantive* and *proscriptive* rights, the regulation's plain language controls when a regulation is clear and unambiguous. *Christensen v. Harris County,* 529 U.S. 576, 588 (2000) ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."). As the court of appeals correctly recognized, there is nothing in the plain language that limits the waiver prohibition to only prospective waivers. Pet. App. 7a-8a. Likewise, there is nothing in the plain language that would suggest that the phrase "rights under FMLA" does not include remedial rights – the right of action provided under section 2617(a)(2). Pet. App. 4a-5a.

Even assuming *arguendo* that the regulation is ambiguous, the Fourth Circuit correctly concluded

that DOL's proffered interpretation is inconsistent with the regulation and should therefore be rejected. Pet. App. 4a-8a, 10a-16a. DOL's interpretation, which in essence suggests that an employee's right of action is not included in the phrase "rights under FMLA" as used in the regulation, is inconsistent with the regulation which in no way limits the rights. This inconsistency is further underscored when the regulation is read in conjunction with the statutory provision it seeks to enforce, section 2615(a)(1), which states that it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, *any right* provided under this subchapter." 29 U.S.C. § 2615(a)(1) (emphasis added).

The court also correctly concluded that DOL's current interpretation, articulated for the first time in its *Amicus* brief filed during the Fourth Circuit's review of this case, is inconsistent with the Department's position at the time the regulation was promulgated in 1995. *See* Pet. App. 13a-16a. As noted by the court in both of its decisions, *id.*, the DOL specifically considered and rejected a proposed amendments that would have excluded severance agreement waivers (generally retrospective waivers) from the waiver prohibition in section 220(d). *See* Preamble to the Final Regulations Implementing the Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995). Rejecting the request to change the provision, the DOL explained that it had carefully considered the comments on section 220(d) and "concluded that prohibitions against employees waiving their rights and employers inducing employees to waive their rights

constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the FLSA." *Id.* Now, more than a decade later, the DOL is saying it did not mean what it said.

Petitioner also argues that the court of appeals disregarded the policy favoring private resolution of disputes when it held that Mrs. Taylor did not waive her FMLA rights. While settlement may be favored in claims involving rights provided under employment statutes like Title VII and the Age Discrimination in Employment Act ("ADEA"), the FMLA is more analogous to the FLSA, and the Fourth Circuit appropriately looked to the FLSA for assistance in interpreting the FMLA waiver provision. *See* S. Rep. No. 103-3, at 35 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 37 ("[The FMLA's] enforcement scheme is modeled on the enforcement scheme of the FLSA . . . . The relief provided in FMLA also parallels the provisions of the FLSA."); *see also Jordan v. U.S. Postal Service*, 379 F.3d 1196, 1201 (10th Cir. 2004) (looking to the FLSA for guidance in interpreting FMLA damages because of the similarity of the damages provisions); *Arban v. West Publ'g Corp.*, 345 F.3d 390, 407-08 (6th Cir. 2003) ("[T]his court previously has turned to the Fair Labor Standards Act (FLSA), which contains similar remedial provisions, for guidance in interpreting the FMLA."); *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 968-69 (10th Cir. 2002) (interpreting FMLA cost provisions in the same way they are interpreted under the FLSA); *Frizzell v. Southwest Motor Freight*, 154 F.3d 641, 644 (6th Cir. 1998) ("Because the FMLA's

link to the remedial provisions of the FLSA is stronger than it is to Title VII . . ., we rely on case law under the FLSA rather than Title VII . . . .").

The FLSA was enacted for the purpose of protecting workers from substandard wages and oppressive working hours. *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, (1981). Recognizing that there are often great inequalities in bargaining power between employers and employees, Congress made the FLSA's provisions mandatory. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945). This Court concluded that based on the policy considerations that an individual employee's statutory entitlements under the FLSA, i.e., right to a minimum wage and to overtime pay, are not subject to negotiation or bargaining between employers and employees, *id.*, and cannot be abridged by contract or otherwise waived because this would "nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine*, 450 U.S. at 740 (internal quotation and citation omitted).

Similarly, the FMLA was enacted to set a minimum labor standard for family and medical leave in an effort to address "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(4). The FMLA "is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish

minimum standards for employment."[5] H.R. Rep. No. 103-8, pt. 1, at 21-22 (1993). Accordingly, the

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[5] The child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment all

> arose in response to specific problems with broad implications. The minimum wage was enacted because of the societal interest in preventing the payment of exploitative wages. Children worked for long hours, under unsafe conditions, before the child labor laws were enacted. The Social Security Act was based on the belief that workers should be assured a minimum pension at retirement. The Occupational Safety and Health Act created standards to help assure safe and healthy workplaces.
>
> *******
>
> There is a common set of principles underlying these labor standards. In each instance, a Federal labor standard directly addressed a serious societal problem, such as the exploitation of child labor, or the exposure of workers to unsafe working conditions. Voluntary corrective actions on the part of employers had proven inadequate, with experience failing to substantiate the claim that, left alone, all employers would act responsibly. Finally, each law was enacted with the needs of employers in mind. Care was taken to establish standards that employers could meet.
>
> It is a minority of employers who act irresponsibly. Even without minimum standards most employers would pay a living wage, take steps to protect the health and safety of their work force, and offer their employees decent benefits. A central reason that labor standards are necessary is to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly. Federal labor standards take broad societal concerns out of the competitive

(*Footnote continued*)

Fourth Circuit's conclusion that "[t]he reasons for the prohibition on private settlement of FLSA claims apply with equal force to FMLA claims," Pet. App 11a, was proper.

Congress's use of the phrase "waiver of rights" in the context of the FLSA supports the court of appeals conclusion that the regulation prohibits the waiver of all of Respondent's FMLA rights – substantive, proscriptive, and remedial – and is not limited to only prospective waivers of these rights. In FLSA section 216(c), Congress authorized DOL to

> supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees . . . , and the agreement of any employee to accept such payment shall upon payment in full constitute *a waiver by such employee of any right he may have under subsection (b)* of this section to such unpaid minimum wages or unpaid overtime compensation and

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process so that conscientious employers are not forced to compete with unscrupulous employers.

The FMLA was drafted with these principles in mind and fits squarely within the tradition of the labor standards laws that have preceded it. In the past, Congress has responded to changing economic realities by enacting labor standards that are now widely accepted. In drawing on this tradition, the FMLA proposes a minimum labor standard to address significant new developments in today's workplace.

H.R. Rep. No. 103-8, pt. 1, at 21-22 (1993).

an additional equal amount as liquidated damages.

29 U.S.C. § 216(c) (emphasis added). Subsection (b) cited in the above statutory language expressly includes a right of action.[6] *Id.* § 216(b). When Con-

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[6] Subsection (b) reads, in full:

(b) Damages; right of action; attorney's fees and costs; termination of right of action.

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum

(Footnote continued)

gress added the waiver provision found in section 216(c) in 1949, it did so to encourage employers who had *already* violated employees' rights under the FLSA to voluntarily settle employees' claims under the supervision of the DOL. *See Sneed v. Sneed's Shipbuilding, Inc.*, 545 F.2d 537, 539 (5th Cir. 1977). Thus, when Congress states in section 216(c) that acceptance of the settlement by an employee constitutes "a waiver . . . of any right . . . under [the FLSA]," Congress is referring to the *retrospective* waiver of rights and also referring to an employee's waiver of their *right to file an action.* Moreover, through the FMLA statutory enforcement provision, 29 U.S.C. § 2617(b), Congress specifically directs the DOL to resolve FMLA complaints in the same manner it resolves complaints under the FLSA – pursuant to 29 U.S.C. § 216.[7]

Additionally, this Court's rationale in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) – the

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wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefore under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title. 29 U.S.C. § 216(b).

[7] The FMLA statutory enforcement provision section 2617(b)(1) provides that "[t]he Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 2615 of this title in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207 of this title." FLSA sections 206 and 207 are investigated and resolve pursuant to section 216. 29 U.S.C. § 216(a)-(b).

case in which this Court created a judicial prohibition against waivers of an employee's rights under the FLSA – also supports the conclusion that the phrase "waiver of rights" as used in the FMLA regulation includes retrospective waivers and includes right of actions.

Brooklyn involved the claims of workers who were not paid their wages in a timely manner as required by the FLSA. The specific issue addressed by the Court with respect to two of the consolidated cases was "whether an employee subject to the terms of the [FLSA] can waive or release his right to receive from his employer liquidated damages under Section 16(b)." *Id.* at 699. In one case the employee signed a "release of all of his rights under [FLSA]." *Id.* at 700. In the second consolidated case involving the waiver issue, the employee signed a "general release of all claims." *Id.* at 701-02. After stating the general proposition that "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy," *id.* at 704, this Court concluded that the "attempted release and waiver of rights under the Act [through the signing of the release] was absolutely void." *Id.* at 714. This Court recognized that by having the employees execute a release, the employer was attempting to effectuate a waiver of the employee's rights under the FLSA. Like the present case, *Brooklyn* involved both a retrospective waiver and a waiver of the right to file suit.

The same policy reasons that supported the employers in *Brooklyn* not being able to avoid their

obligations and responsibilities under the FLSA, support the Fourth Circuit's conclusion that (relying on the plain meaning of 825.220(d)) Petitioner in this case will not be able to avoid its obligations and responsibilities under the FMLA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

PROGRESS ENERGY, INC.
Petitioner,

v.

BARBARA TAYLOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Family and Medical Leave Act (FMLA), 29 U.S.C. 2601 *et seq.*, is one of the most broadly applicable and commonly invoked sources of employee rights, covering an estimated 76 million employees. Within the Fifth Circuit, employers and employees may privately resolve the multitude of FMLA claims that arise. *Faris* v. *Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). Employers and employees within the Fourth Circuit cannot. Pet. App. 1a-20a. Numerous other courts have issued conflicting signals on the validity of FMLA waivers, particularly in the wake of the Fourth Circuit's decision here. As the five amicus briefs filed in this case demonstrate, employers are now "caught in the middle, wondering which way to go," Jeffery J. Kros, *Courts Split on FMLA Waivers*, Workspan (Oct. 1, 2005), because the validity of thousands of settlements and waivers now depends on the geographical accident of where an employee can sue. Given the demonstrated need for this Court's immediate intervention, petitioner has accelerated the submission of this case, so that it can be disposed of this Term. Respondent fails to undercut the compelling showing that certiorari is warranted.

1. a. The Fourth Circuit's decision is in avowed conflict with the Fifth Circuit's decision in *Faris* v. *Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). See Pet. App. 6a-8a, 17a, 36a.

Respondent admits the conflict, but attempts to characterize it as limited to the waiver of "retaliation claims" and not "*substantive* rights" under the FMLA. Br. 8-9. That argument fails. Neither the Fourth nor

the Fifth Circuit relied on such a distinction. The Fourth Circuit categorically held that, absent approval by a court or the Department of Labor, the regulation "precludes both the prospective and retrospective waiver of *all* FMLA rights, including the right of action (or claim) for a past violation of the Act." Pet. App. 3a (emphasis added). The Fifth Circuit held the opposite, concluding that "the proper reading of the regulation is that it does not apply to post-dispute claims for damages under the FMLA." *Faris*, 332 F.3d at 319. See also *id.* at 321 ("A plain reading of the regulation is that it prohibits prospective waiver of rights, not the post-dispute settlement of claims.").[1]

Nor is there any support for respondent's distinction in the text of the FMLA or the regulation. The statute makes it uniformly "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right." 29 U.S.C. 2615. The regulation is equally unqualified with respect to which rights are covered. 29 C.F.R. 825.220(d) ("Employees cannot waive, nor may employers induce employees to waive, their rights under the FMLA.").

Respondent, in fact, makes no effort to explain how either the Fourth Circuit's analysis or the regu-

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[1] The Fifth Circuit's passing reference to "post dispute causes of action for retaliation" (332 F.3d at 320) was simply descriptive of the facts at hand. That does not, as respondent argues (Br. at 10 n.3), render the rest of the court's decision "dictum." See *Seminole Tribe* v. *Florida*, 517 U.S. 44, 67 (1996) ("[I]t is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

lation's text could support her proposed distinction – unless she now admits that the regulatory text is ambiguous. But that simply highlights yet another reason for this Court's review: the conflict between the decision below and this Court's precedent, which holds that the expert agency's resolution of ambiguity in its own regulations controls. See *Long Island Care at Home, Ltd.* v. *Coke*, 127 S.Ct. 2339, 2347, 2349 (2007); *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

b. Respondent notes that the circuit split involves only two courts of appeals. That is true, just as it was when this Court granted certiorari to review the application of another FMLA regulation in *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). As that case shows, the significance of a conflict is measured not just by its breadth, but also by its practical impact. The FMLA applies to all employers engaged in or affecting commerce who have more than 50 employees. 29 U.S.C. 2611(4). Given the realities of the modern economy, a large number of covered employers have employees in multiple jurisdictions. For them, disuniformity in their obligations under federal law takes its toll as soon as it arises. What matters for purposes of business decisionmaking and the formulation and implementation of employment policies is the presence of uncertainty in the law. The breadth of the instability is less relevant because the need for uniformity in business operations generally forces employers to conform their day-to-day practices to the demands of the most restrictive circuit law. See Ass'n of Corp. Counsel Amicus Br. 6-7 (detailing the problems caused by the Fourth Circuit's decision). That is why so many amicus briefs – rang-

ing from the Chamber of Commerce to human resource managers – have been filed in this case pleading urgently for this Court to bring stability and clarity to the law now.

Moreover, the uncertainty faced by employers and employees reaches more widely than the Fourth and Fifth Circuits. District courts have also issued conflicting decisions on the waiver question. See Pet. 11 & n.5 (citing cases). In addition, while the Sixth Circuit has enforced the settlement of FMLA claims (*Halvorson* v. *Boy Scouts of America*, 215 F.3d 1326, 2000 WL 571933 (6th Cir. 2000)), at least one district court has questioned that practice in light of the Fourth Circuit's decision (see *Bieber* v. *The Mfg. of America, Inc.*, No. 2:06-CV-481, 2007 WL 2688272, at *2 (S.D. Ohio Sept. 11, 2007)). Other courts have questioned the validity of waivers as well. See *Bittner* v. *Blackhawk Brewery & Casino, LLC*, No. 03-CV-02274, 2005 WL 1924499, at *5 n.2 (D. Colo. Aug. 9, 2005) (relying on Fourth Circuit's first panel decision). Plaintiffs' attorneys have even started to argue that an employer's *offer of settlement* is an unlawful interference with FMLA rights. See *Sutherland* v. *Goodyear Tire & Rubber Co.*, 446 F. Supp. 2d 1203, 1214 (D. Kan. 2006) (rejecting the claim, but noting that the original panel decision in this case might support it). The repercussions of the conflicting court of appeals decisions thus are currently being felt nationwide by employers, who face damages claims if they pick the wrong side of the dispute. See 29 U.S.C. 2617(a).

c. Finally, respondent argues (Br. at 10) that review should be postponed to permit "more developed

case law." But there is nothing more to develop. The only question is whether the word "rights" in the regulation is ambiguous. Additional court decisions will simply line up on one side or the other of that debate, without changing the basic analysis.

The only other consequence of postponing review is that federal courts will have to start reviewing and approving thousands of settlements and waivers of FMLA rights, since the Department of Labor's lack of any review mechanism will force parties to turn to the courts. But that diversion of scarce judicial resources will not make the legal question before this Court any clearer or any better positioned for review.

2. The question of whether FMLA claims can be waived or settled is of enormous legal and practical importance. As the Chamber of Commerce explains (Br. 4), the court of appeals' decision directly calls into question "tens (if not hundreds) of thousands of releases entered into between employers and employees as part of reductions in force, private settlements, and voluntary separation programs." Moreover, the decision harms employees as much as employers by "cast[ing] doubt over the ability, and willingness, of employers to enter into individual and group separation agreements, where the ability to secure a general release (and thereby avoid future litigation) is the *sine qua non* for generous separation payments and benefits." Ass'n of Corp. Counsel Amicus Br. 3; see U.S. Chamber Br. 8-9; EEAC Br. 7-8.

Respondent asserts (Br. 11) that employers can seek Department of Labor approval of severance agreements in "situations where a risk of FMLA liability exists." That is wrong. First, there is no proc-

ess for securing such Department of Labor approval, as the Department itself has explained. DOL Ct. App. Br. at 3, 14. Respondent's reliance on 29 U.S.C. 2617(b), is misplaced. That is an administrative civil enforcement provision that authorizes the Secretary of Labor to "receive, investigate, and attempt to resolve complaints of violations." *Ibid.* A private waiver or settlement of existing claims is not a "complaint" to the Department of Labor seeking "[a]dministrative action" to enforce the FMLA. *Ibid.*

Second, respondent's argument ignores the reality that employers cannot adopt and implement a complex matrix of employment practices and severance policies based on varying, one-at-a-time assessments of the risk of FMLA liability for individual employees.

Respondent further argues (Br. 8) that the issue is unimportant because only two circuits are in conflict. But the case law is not so "[s]parse" as respondent suggests. See Part 1(b), *supra*; Pet. 11 & nn. 4, 5. Beyond that, until the Fourth Circuit's decision here, employees justly would have assumed that the law would make them keep the promises they had made in exchange for generous severance payments and other benefits. That has all changed now. Given both the FMLA's sweeping coverage of roughly 76 million employees, Pet. 20, and the *millions* of severance agreements that have already waived FMLA claims, see Chamber of Commerce Br. 10, 12, the impact of the conflict is enormous and enormously important.

In a footnote (Br. 10 n.4), respondent notes that the Department of Labor previously issued a "Request for Information" that referenced the waiver is-

sue as one of twelve matters for which input was sought. See 71 Fed. Reg. 69504, 69509-10 (Dec. 1, 2006). But that request did not indicate that the Department intended to issue a revised regulation any time in the reasonably near future. In fact, in a subsequent report, the Department underscored that "[t]here are no proposals for regulatory changes being put forward by the Department," and that the Department was just seeking "a fuller discussion" of how its regulations "have played out in the workplace." 72 Fed. Reg. 35550 (June 28, 2007).

Indeed, petitioner is not aware of *any* substantive amendments made to the Department's FMLA regulations in years. For example, the regulation invalidated by this Court in 2002 in *Ragsdale* has never been amended, notwithstanding the Department's announcement in 2003 that a change would be forthcoming. See 68 Fed. Reg. 30559 (May 27, 2003).

Even were the Department to break from past practice and amend the regulation, years would likely pass before the regulatory process and judicial challenges were completed. In the meantime, innumerable severances would occur and the validity of additional tens (if not hundreds) of thousands of waivers, severance agreements, and settlements would remain in doubt and subject to varying rules in different jurisdictions.

3. Respondent focuses the remainder of her argument on the merits of the decision below. But for present purposes all that matters is that, whichever court of appeals is correct, a single answer and stability in the law is urgently needed.

Respondent's arguments are incorrect in any event. The Department of Labor's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation" (*Auer*, 519 U.S. at 461) (internal quotation marks and citations omitted), and the ambiguity of the regulation is confirmed not only by the conflicting court of appeals' decisions, but also by this Court's own distinction between "rights" and "claims" or "causes of action" in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

Respondent also argues that her cause of action is a "right" protected under the statutory prohibition on employers "interfer[ing] with, restrain[ing], or deny[ing] the exercise of" FMLA rights. 29 U.S.C. 2615(a)(1). (Br. 14-15) Perhaps, but that begs the questions of whether the right to settle a claim is an ordinary incident of that right, and whether an employee's and employer's voluntary, cooperative, and mutually beneficial resolution of a claim constitutes "interfere[ence]" with that right.

Respondent also makes no effort to defend the Fourth Circuit's creation out of whole cloth of the caveat that settlements and waivers are permitted if approved by the Department of Labor or a federal court. The Fourth Circuit identified no basis in the text of the statute, the regulation, or the policies underlying the FMLA for the *post hoc* review provision that it crafted. The impact of that decision, and its profound departure from basic principles of administrative law and agency deference, merit this Court's review. See *Long Island Care*, 127 S.Ct. at 2339; *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (where a decision involves "a determination of policy or

judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment").

Respondent also argues (Br. 15-16) that the Department's interpretation does not merit deference because it was adopted for the first time in this litigation. That is wrong on the law. See *Long Island Care*, 127 S.Ct. at 2349 (deferring to agency interpretation even though "the Department appears to have written [the Advisory Memorandum] in response to this litigation," because the Court had "no reason . . . to suspect that [this] interpretation is merely a *post hoc* rationalization[n] of past agency action, or that it does not reflect the agency's fair and considered judgment on the matter in question"); *Auer*, 519 U.S. at 462-463 (upholding interpretation first presented in brief to the Court). It is also wrong on the facts. See DOL Amicus Br. at 6, 11-12 & n.11, 19; *Dougherty* v. *Teva Pharms. USA, Inc.*, Civ. No. 05-2336, 2007 WL 1165068 (E.D. Pa. Apr. 9, 2007) (explaining the longstanding tenure of the Department's position).

Finally, respondent's argument ignores the strong public policy in favor of the private resolution of employment disputes. See Pet. 15-19. Respondent's analogy to the Fair Labor Standards Act is misplaced. See Pet. 16-18. The mere fact that a statute is modeled in some respects on the FLSA (Br. 16) does not suggest that waiver is proscribed. Indeed, waiver and settlement have long been permitted for Equal Pay Act claims notwithstanding that the Equal Pay Act is part of the FLSA. *Wagner* v. *NutraSweet*

Co., 95 F.3d 527, 532 (7th Cir. 1996); see also *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-29 (1991) (permitting private resolution of ADEA claims, even though the ADEA is modeled on the FLSA, see *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 347 (1998)). The nature of the rights at issue, moreover, is more analogous to Title VII, for which waiver is permitted. See *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003); 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995) ("FMLA provides the same sorts of protections to workers who oppose, protest, or attempt to correct alleged violations of the FMLA as are provided to workers under Title VII.").

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

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PROGRESS ENERGY, INC.
Petitioner,

v.

BARBARA TAYLOR,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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STATEMENT

The United States has now joined its voice with those of petitioner, *amicus* Chamber of Commerce, *amicus* Association of Corporate Counsel, *amicus* Equal Employment Advisory Council, *amicus* Society for Human Resource Management, and *amicus* North Carolina Retail Merchants Association in recognizing that the Fourth Circuit's decision in this case (i) is wrong (US Br. 8); (ii) creates a direct inter-circuit conflict with the Fifth Circuit, and substantial tension in the law generally (*id.* 9); (iii) is irreconcilable with this Court's precedent governing deference to agencies' interpretations of their own regulations, including this Court's recent decision in *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008) (US Br. 9); and (iv) substantially and immediately impedes the ability of thousands of employees and employers within the Fourth Circuit (not to mention nationwide) to resolve the enormous volume of Family and Medical Leave Act (FMLA) claims that arise due to that statute's sweeping coverage, and thus to settle disputes, to execute binding severance agreements, and to implement early-out retirement programs (*id.* 18).

Having devoted 99% of his brief to advancing arguments in favor of review, the Solicitor General recommends that certiorari be denied for one reason only: the pendency of a Notice of Proposed Rulemaking. But the uncertain prospect of a regulatory amendment at some undefined, but almost assuredly far distant, time in the future (if ever) does nothing to change the need for this Court's intervention now. The Fourth Circuit's decision, after all, did not affect

only a narrowly cabined or infrequently recurring aspect of regulatory administration and enforcement, nor does it involve a peculiar problem arising under a statute the coverage of which is limited to a specialized area. Quite the opposite, the court held that *no claim* arising under *any* provision of the FMLA – a statute that governs virtually *every employer* in the Nation, public or private, with more than 50 employees, 29 U.S.C. 2611(4), and that applies to more than *76 million employees* (Pet. 20) – can *ever* be settled or resolved on *any* terms, for *any* reason, or in *any* way outside of a courtroom (or a non-existent Department of Labor review process).

As the government's own brief demonstrates, the sweep and implications of that ruling for both employees and private and governmental employers are breathtaking, especially as businesses struggling through an economic downturn search for ways to make their operations more streamlined and efficient and employees affected by economic downsizing become more heavily reliant on severance and early-out benefit packages. The potential of a purely prospective regulatory change at some undefined time in the future thus does nothing to alleviate the churning uncertainty and disruption that employers, employees, and courts face today and will continue to confront in the years to come absent this Court's intervention. Beyond that, the pendency of the proposed rulemaking is no answer at all to the Fourth Circuit's suggestion that the Department of Labor lacks the regulatory authority under any circumstances to permit the settlement of FMLA claims, because (in the court of appeals' view) Congress forbade settle-

ments under the FMLA just as it did under the Fair Labor Standards Act. Certiorari should accordingly be granted.

1. The brief of the United States largely reinforces the appropriateness of this Court's certiorari review. The government agrees with petitioner and the five *amici* that the Fourth Circuit's decision "creates a direct conflict" (US Br. 16) with the Fifth Circuit's ruling in *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (2003). As the United States further emphasizes, the Fourth Circuit's decision has also already led to "differing conclusions" by district courts in five different circuits across the Country. See US Br. 17-18. That disuniformity has no prospect of abating and, indeed, is guaranteed to grow should certiorari be denied and the Fourth Circuit decision be left standing as authority for plaintiffs to invoke nationwide.

The United States likewise concurs with petitioner and its *amici* that the Fourth Circuit's decision cannot be reconciled with this Court's "well-established precedent" – reconfirmed just three months ago – affording "controlling deference" to an agency's "permissible interpretation of its own regulation." US Br. 9 (citing, *inter alia*, *Holowecki*, *supra*). As the United States explains (Br. 9-10), the Department of Labor's considered determination that its regulation prohibits only the prospective waiver of rights, and not the retrospective settlement of claims, is longstanding, consistent, and "predicated on an important and well-understood dichotomy" between the settlement of past disputes, which is permitted, and a waiver of protection against future employer misconduct, which is not permitted. In addition, the United

States echoes petitioner's argument (Pet. 15-16) that the Fourth Circuit's decision contravenes the important policy and "longstanding judicial precedent encouraging the settlement of employment claims" (US Br. 12-13).

Finally, the United States joins petitioner (Pet. 20-25) and its *amici* in recognizing the substantial and ongoing "practical problems" caused by the Fourth Circuit's erroneous decision (US Br. 19). As the government notes, the court of appeals' decision "prevents employers from settling claims with finality," and likewise "prevents * * * employees from obtaining payments through such settlements." US Br. 18. The problems do not stop there, however. As the United States anticipates, the substantial "uncertainty created by the court's decision may discourage employers *nationwide* from offering settlement or severance agreements, thereby prompting increased litigation and reducing or eliminating the additional compensation employees often receive under such agreements." *Ibid.* (emphasis added). Beyond that, the brief for the United States (specifically joined by the Department of Labor) all but admits that the Department has no intention of establishing a settlement review mechanism (US Br. 18-19), leaving the full burden of approving every FMLA settlement, waiver, severance, and early-out retirement offer squarely on the shoulders of the federal judiciary. Of course, if federal courts conclude that Article III's prohibition on issuing advisory opinions forbids such open-ended rubber-stamping of private contracts, then there will be no mechanism available *at all* for resolving FMLA disputes outside of adversarial liti-

gation. That is an unendurable situation for employers and employees alike, which fully merits this Court's intervention.

2. The undeterminable prospect that the pending notice of proposed rulemaking might at some undefined time in the future clarify the regulatory text is no answer to that present and pressing need for this Court's review.

First, having analyzed at length the problems with the Fourth Circuit's decision and the immediate, continuing, and widespread impact of the decision, the government offers no assurance at all that any regulatory change will, in fact, *ever* materialize. This is not, after all, a case where a regulation is in the final stages of approval, or where regulatory problem can be resolved expeditiously through less formal agency action. All that has happened is that the Department of Labor issued a massive *notice* of *proposed* rulemaking, which included an amendment to 29 C.F.R. 825.220(d) as just one of 54 distinct and diverse proposed changes. This particular proposal, moreover, has already been greeted with direct and immediate resistance from the plaintiff's bar and labor organizations. See 73 Fed. Reg. 7876, 7901 (Feb. 11, 2008) (noting opposition of the National Employment Lawyers Association); http://www.aflcio.org/mediacenter/prsptm/pr04112008.cfm (AFL-CIO); http://www.nationalpartnership.org/site/DocServer/National_Partnership_DOL_NPRM_Comments.pdf?docID=3181 (National Partnership for Women and Families).

The most that the Department is willing to say about the amendments' prospects is that it is "in the

process of reviewing the submitted comments." US Br. 19. But that means that not even the Department of Labor has yet committed to making the proposed regulatory change. And that is why the brief for the United States offers this Court no assurance that any change will occur at all, let alone any timeframe for action and thus for relieving the constraints and legal uncertainty under which employers, employees, and courts continue to labor every day. Instead, the United States does nothing more than passively observe that "[i]f" the regulation is adopted, the regulation's ambiguity may be resolved prospectively. US Br. 19.

When, in the past, this Court has been faced with the indeterminacy of such a nascent regulatory process, it has frequently granted certiorari, notwithstanding the United States' contrary recommendation. See, *e.g.*, US Br. in Opp. at 5, No. 06-1286, *Knight v. Comm'r of Internal Revenue* ("That conflict, however, does not require resolution by this Court because it is likely to be resolved by new regulations interpreting Section 67(e)(1)."), cert. granted, 127 S. Ct. 3005 (June 25, 2007); US Br. in Opp. at 15, No. 06-1181, *Dada v. Mukasey*, ("Although the courts of appeals are divided on the question, review is not warranted in this case or at this time * * * in light of the judicial decisions and issues that have been raised, the Department of Justice has determined that it will promulgate regulations specifically regarding the tolling question presented by this case."), cert. granted, 128 S. Ct. 36 (Sept. 25, 2007); US Cert. Amicus Br. at 9, No. 00-952, *Wisconsin Dep't of Health and Family Servs. v. Blumer* ("Nonetheless,

we do not believe that review of the issue by this Court is warranted at this time. The United States Department of Health and Human Services has informed us that, in light of the Wisconsin Court of Appeals' invalidation of the income-first rule on a statewide basis, it plans promptly to promulgate regulations addressing the question presented here."), cert. granted, 531 U.S. 1141 (Feb. 20, 2001); cf. US Cert. Br., No. 00-6029 at 9, 20, *Ragsdale v. Wolverine World Wide, Inc.* (recommending against certiorari to review invalidation of FMLA regulation), cert. granted, 533 U.S. 928 (June 25, 2001).

Second, the government's conspicuous reticence is understandable. If past is prologue, then the proposed rulemaking has little realistic prospect of ever coming to fruition. The Department of Labor has been notoriously unsuccessful in promulgating timely regulatory changes. Indeed, in the entire time since the Department first adopted its FMLA regulations in 1995, it has never adopted a substantive amendment. For example, the regulation invalidated by this Court in 2002 in *Ragsdale* has never been amended, notwithstanding the Department's announcement in 2003 – fully *five years ago* – that a change would be forthcoming. See 68 Fed. Reg. 30559 (May 27, 2003). The current notice revives the *Ragsdale* proposal yet again, 73 Fed. Reg. at 7923 – now six years after this Court's invalidation of the original regulation.

The FMLA is not unique in that respect. For example, in 1982, the Department of Labor issued a notice of proposed rulemaking to amend its child labor regulations to address the hours and times children

can work, which "generated considerable public interest." 72 Fed. Reg. 19328, 19329 (Apr. 17, 2007). Twenty-five years later, the Department noted that it had suspended further consideration of that "proposal" and that no final rule was ever implemented. *Ibid.* In 1988, Labor similarly issued a notice of proposed rulemaking addressing "adequate consideration" for assessing the purchase of company stock by an employee stock ownership plan under the Employee Retirement Income Security Act. 53 Fed. Reg. 17,632, 17,633 (May 17, 1988). No final regulation has ever been promulgated. See *Henry v. Champlain Enterprises, Inc.*, 445 F.3d 610, 619 (2d Cir. 2006).

Even when Labor has succeeded in enacting final regulations, the process has been measured in years and even decades. An update of regulations governing overtime pay took 19 years. See 50 Fed. Reg. 47696 (Nov. 19, 1985); 69 Fed. Reg. 22122 (Apr. 23, 2004). The promulgation of child labor regulations involving "hazardous orders" spanned a decade. See 59 Fed. Reg. 25167 (May 13, 1994) (ANPRM); 64 Fed. Reg. 67130 (Nov. 30, 1999) (NPRM); 69 Fed. Reg. 75382 (Dec. 16, 2004) (final rule).

Given (i) the opposition that the proposal to amend 29 C.F.R. 825.220(d) in particular has already generated, (ii) the fact that it is only one small piece of a sweeping package of approximately 54 proposed regulatory changes spanning 125 pages of the Federal Register and inspiring more than 6,000 comments, along with significant opposition, and (iii) the impending change in Administrations and thus in the personnel responsible for final regulatory approval (and perhaps approach to FMLA's administration),

there is little realistic prospect that any amendment to Section 825.220(d) will be forthcoming in the foreseeable future and certainly not in a sufficiently timely manner to alleviate the substantial legal and practical problems inflicted on employers and employees daily by the Fourth Circuit's decision.

Third, even if Labor eventually chooses to go forward with a regulatory amendment and, contrary to history, experience, and politics, a new regulation is eventually promulgated, the government's prediction that the change would "effectively abrogate the Fourth Circuit's decision – at least on a going forward basis" (US Br. 19) is not well taken, as it fails to account for the inevitable challenges to the regulation.

The government's prediction thus overlooks that the Fourth Circuit not only rejected Labor's interpretation of its own regulation, but also strongly suggested that Labor has no statutory authority to adopt regulations permitting the prospective waiver of FMLA rights. The Fair Labor Standards Act prohibits all private settlements (see Pet. 16-17) and, in the Fourth Circuit's view, "[t]he reasons for the prohibition of private settlements of FLSA claims *apply with equal force* to FMLA claims" (Pet. App. 11a (emphasis added)). The court accordingly cautioned that "[t]he settlement or waiver of claims is not permitted when 'it would thwart the legislative policy which [the employment law] was designed to effectuate.'" *Id.* at 10a. In so doing, the Fourth Circuit suggested its *substantive* disapproval of *any* regulatory authorization for the settlement of FMLA claims, on the ground that it would conflict with the FLSA model that Congress intended to adopt. See also US Br. 7,

13 (noting the Fourth Circuit's equation of the FMLA and FLSA). There thus is a substantial question whether a regulatory amendment by itself will be sufficient to correct the Fourth Circuit's erroneous course and to bring desperately needed clarity and uniformity to this vital question. And even if it would, no such relief would arrive until the regulation not only has been promulgated by the Department of Labor, but also has run the gauntlet of litigation challenges to the regulation, the regulatory process, and the Department's statutory authority. The ability of employers and employees to settle or resolve informally disputes arising under a statute that employees invoke more than 10 million times a year (Pet. 20 & n.7) simply cannot be left hanging in such prolonged legal limbo.

Fourth, as the Solicitor General notes, even if Labor elects to pursue the regulatory amendment, succeeds in promulgating it, and prevails in litigation challenging the regulation, the change would protect settlements only "on a going forward basis." US Br. 19. The new regulation would do nothing to address the lawfulness of tens of thousands of settlements, severance agreements, and early-out retirement waivers will by that indeterminate date in the future have already been executed. As the *amicus* briefs submitted in support of the petition for certiorari demonstrate, the uncertainty over the lawfulness of FMLA releases is unsustainable for business today, let alone over an open-ended span of years. In addition, as the government notes (Br. 17-18), a number of district court decisions have already been forced to wrestle with the implications of the Fourth Circuit's

decision. That volume of litigation will multiply exponentially once the plaintiffs' bar, emboldened by a denial of certiorari, launches a much broader array of suits based on previously released FMLA claims.

The government, for its part, is noticeably silent not only about the prospect and timing of any regulatory change, but also about what exactly employers and employees are supposed to do in the lengthy interim with the tens of thousands of FMLA disputes that arise annually. Stalling – or, worse, litigating – every single FMLA dispute outside the Fifth Circuit pending a lengthy and profoundly uncertain regulatory process is simply not viable.

3. Given the government's acknowledgment (Br. 18-19) of the widespread and untenable legal and practical problems caused by the Fourth Circuit's decision, that ruling should not be left standing pending an uncertain regulatory process and, for all of the foregoing reasons and those stated in the petition, petition reply, and five *amicus* briefs, plenary review is warranted. Alternatively, the Court could hold the petition over its summer recess in order to better assess whether the notice of proposed rulemaking has any realistic prospect of materializing.

In addition, as the United States notes (Br. 9), the Fourth Circuit's decision squarely conflicts with this Court's recent decision in *Holowecki*, *supra*, which reaffirmed the rule of deference to agency interpretations of their own regulations even when expressed in litigation and even when (as the Fourth Circuit wrongly found here (compare Pet. App. 13a-16a, with US Br. 10-12)) an agency's position has been inconsistent. See 128 S. Ct. at 1156-1157. In so holding,

this Court stressed that an "agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force," and that, as a consequence, federal courts must "accept the agency's position unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 1155 (citations omitted). As the United States explains (Br. 9-13), the Fourth Circuit's decision is contrary to *Holowecki* and the principles of agency deference it confirms. Accordingly, if the Court does not grant plenary review, the Court should grant the petition, vacate the judgment below, and remand for further consideration in light of *Holowecki*. Vacatur would also have the salutary effect of not permitting the Fourth Circuit's deeply flawed judgment to become final and the conflicting legal regime it creates to take firm root.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition and the petition reply brief, the petition for a writ of certiorari should be granted. In the alternative, the petition should be granted, the judgment below vacated, and the case remanded for further consideration in light of *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008).

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PROGRESS ENERGY, INC., PETITIONER

v.

BARBARA TAYLOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a Department of Labor regulation stating that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the Family and Medical Leave Act (FMLA)]," 29 C.F.R. 825.220(d), prohibits not only the prospective waiver of FMLA rights but also the private settlement of FMLA claims based on past employer actions.

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In the Supreme Court of the United States

No. 07-539

PROGRESS ENERGY, INC., PETITIONER

v.

BARBARA TAYLOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The Family and Medical Leave Act of 1993 (FMLA or the Act), 29 U.S.C. 2601 *et seq.*, provides eligible employees of covered employers the right to take up to 12 weeks of unpaid leave during any 12-month period for specified reasons, including the employee's own serious health condition. See 29 U.S.C. 2612(a)(1). The Act guarantees employees reinstatement to the same or an equivalent position after taking such leave. See 29 U.S.C. 2614(a)(1). In addition, the FMLA prohibits employers from interfering with an employee's exercise of rights under the Act and from retaliating or discriminat-

ing against an employee for opposing practices made unlawful under the Act. See 29 U.S.C. 2615. The Act also provides a private cause of action for employees whose FMLA rights have been violated. See 29 U.S.C. 2617(a).

b. The Secretary of Labor administers and enforces the FMLA. See 29 U.S.C. 2616(a), 2617(b) and (d). The Act directs the Secretary to "prescribe such regulations as are necessary to carry out" the FMLA's provisions. 29 U.S.C. 2654. Pursuant to that authority, and after notice-and-comment, the Department of Labor (DOL) promulgated detailed regulations under the FMLA. See 60 Fed. Reg. 2180 (1995) (final rule). The regulation relevant here states:

> Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (see § 825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."

29 C.F.R. 825.220(d).

c. On February 11, 2008, DOL published a Notice of Proposed Rulemaking (Notice) proposing various revisions to the FMLA regulations. See 73 Fed. Reg. 7876. In relevant part, the Notice proposes to "clarify" the

language in Section 825.220(d) in light of the court of appeals' decision in this case. *Id.* at 7901. Specifically, the proposal would "make explicit in paragraph (d) that employees and employers should be permitted to voluntarily agree to the settlement of past claims without having to first obtain the permission or approval of the Department or a court." *Ibid.*; see *id.* at 7978-7980 (text of proposed revision of Section 825.220(d)). The Notice emphasizes that "[t]he Department does not believe this is a change in the law," and observes that "it has never been the Department's practice, since the enactment of the FMLA, to supervise such voluntary settlements." *Id.* at 7901. The comment period on the proposed regulations closed on April 11, 2008. *Id.* at 7876. Final regulations have not yet been promulgated.

2. Respondent worked for Carolina Power & Light Company (CP&L), a subsidiary of petitioner. Pet. App. 23a.[1] In April 2000, respondent began experiencing health problems that continued for the remainder of the year and into the beginning of the following year. *Id.* at 23a-24a. During that time, respondent missed a number of days of work for medical testing and treatment related to her health condition, including occasions during which she missed five consecutive days of work. *Ibid.* Respondent ultimately had surgery for her health condition in December 2000, and was out of work for approximately six weeks. *Id.* at 24a.

Immediately after her first health-related absence, and on subsequent occasions, respondent asked a representative of CP&L's human resources department whether any of her absences qualified as FMLA leave. Pet.

[1] Because this case was decided on petitioner's motion for summary judgment, the facts are stated in the light most favorable to respondent, the non-moving party. Pet. App. 22a-23a.

App. 23a. The representative told respondent that her absences did not qualify because she had not been absent from work for more than five consecutive days at any one time. *Ibid.* After respondent's surgery in December 2000, she was told that her six-week absence qualified as FMLA leave, although she later discovered that only four of the six weeks had been credited as FMLA leave. *Id.* at 24a.

In February 2001, respondent received a poor performance evaluation for the prior year because of her health-related absences and was given a below-average pay raise. Pet. App. 24a. In May 2001, CP&L informed respondent that her employment was being terminated as part of a reduction in force. *Id.* at 24a-25a, 48a. The company advised her that, in addition to benefits under CP&L's transition plan, she would receive additional benefits, including monetary compensation, if she signed and returned a general release and severance agreement stating:

> In consideration of severance payments made by the company, employee hereby releases CP&L and its parent . . . from all claims and waives *all* rights employee may have or claim to have relating to employee's employment with CP&L . . . or employee's separation therefrom.

Id. at 25a. Although the release does not specifically mention the FMLA, it includes a "catchall" category for claims arising under "any other federal * * * law." *Id.* at 26a. In exchange for signing the release, respondent received approximately $12,000. *Ibid.*

3. Respondent sued petitioner in federal court for alleged violations of the FMLA. Pet. App. 46a. Petitioner moved for summary judgment, arguing that the

release respondent had signed provided the company a complete defense to respondent's suit. *Id.* at 46a, 53a. Respondent countered that Section 825.220(d)'s prohibition on the waiver of FMLA rights rendered the release invalid. *Id.* at 53a.

The district court granted petitioner's motion for summary judgment, holding that Section 825.220(d) does not render the release unenforceable. Pet. App. 58a-59a, 65a. Following the Fifth Circuit's decision in *Faris* v. *Williams WPC-I, Inc.*, 332 F.3d 316, 320-321 (2003), the district court concluded that the regulation precludes only "the prospective bargaining away of * * * substantive rights," and therefore "does not preclude the post-dispute settlement of a claim alleging that those substantive rights have been previously violated." Pet. App. 58a-59a. The district court noted that "[i]f the USDOL intended to bar all releases of such claims, it could have used language to make that clear. It did not." *Id.* at 59a. The court also stated that a contrary interpretation would render the FMLA unique in the area of federal employment law and would create "serious issues of judicial economy." *Id.* at 60a-61a.

4. a. The court of appeals reversed. Pet. App. 21a-44a (*Taylor I*). It concluded that Section 825.220(d)'s plain language prohibits both the prospective and retrospective waiver of any FMLA right, including the post-dispute settlement or release of FMLA claims. *Id.* at 31a. The court stated that its interpretation was supported by the preamble that accompanied the final regulation. *Id.* at 33a. The court read the preamble as "rejecting business's suggestion that waivers and releases should be allowed in connection with the post-dispute settlement of FMLA claims," thereby "ma[king] clear

that § 825.220(d) was never intended to have only prospective application." *Id.* at 34a.

The court of appeals also reasoned that the reference in the preamble to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, incorporated into the regulation the FLSA's judicially-developed restriction on private settlements. Pet. App. 34a; see *id.* at 39a-40a ("[T]he FMLA's language, structure, and the congressional intent behind its enactment" indicate "that the FMLA was to be implemented in the same way as the FLSA."). The court stated that 29 U.S.C. 2617(b)(1), which provides that "[t]he Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 2615 of this title in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of [the FLSA]," grants DOL "*statutory* authority to supervise and approve the settlement and waiver (or release) of FMLA claims." Pet. App. 41a. The court concluded that Section 825.220(d), as interpreted by the court, was a "permissible construction" of the FMLA under *Chevron*. *Id.* at 43a (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984)).

b. Petitioner requested rehearing en banc. Pet. App. 3a. DOL filed an amicus brief in support of the petition explaining that, contrary to the court of appeals' interpretation, Section 825.220(d) prohibits only the prospective waiver of FMLA rights, not the settlement of FMLA claims for past violations. *Ibid.* The court of appeals granted panel rehearing to consider DOL's interpretation and vacated its decision. *Id.* at 3a, 69a. The case was reargued, with DOL participating as amicus curiae. *Id.* at 3a.

c. On rehearing, the court of appeals reaffirmed and reinstated its original decision. Pet. App. 1a-20a (*Taylor II*).

The court first rejected DOL's interpretation of its own regulation as inconsistent with the plain text of the regulation. Pet. App. 4a-8a. The court stated that Section 2617(a) grants a "remedial" right under the FMLA to bring an action or claim, and that Section 825.220(d), "by specifying 'rights under FMLA,' therefore refers to *all rights* under the FMLA, including the right to bring an action or claim for a violation of the Act." *Id.* at 5a.

The court also rejected DOL's argument that its interpretation of Section 825.220(d) is consistent with the general public policy favoring the post-dispute settlement of employment law claims. Pet. App. 10a. The court reasoned that the FMLA is a labor standards law like the FLSA, and that "[t]he reasons for the prohibition on private settlement of FLSA claims apply with equal force to FMLA claims." *Id.* at 10a-11a. The court further stated that Congress effectively indicated that the FLSA provides the best settlement model for the FMLA by making a cross-reference to the FLSA's enforcement scheme in Section 2617(b)(1). *Id.* at 12a-13a.

Finally, the court of appeals rejected DOL's interpretation of the regulation set out in its amicus brief because the court determined that it was inconsistent "with what the DOL said it intended the regulation to mean [in the preamble] at the time it was promulgated." Pet. App. 13a. Based on this perceived inconsistency, the court concluded that deference to DOL's interpretation of its own regulation was not appropriate. *Ibid.*

Judge Duncan dissented. Pet. App. 17a-20a. She stated that, once DOL filed an amicus brief setting out its interpretation of its regulation, the question "is no

longer whether the interpretation that we adopted in *Taylor I* was reasonable, but rather whether it is compelled by the language of the regulation." *Id.* at 19a. Judge Duncan concluded that it was not so compelled, stating:

> There are few words in the legal lexicon more ubiquitous and freighted than the term 'right.' * * * The mere fact that the statute creates a '[r]ight of action,' 29 U.S.C. § 2617(a)(2), and the regulation refers to 'rights under FMLA,' 29 C.F.R. 825.220(d), may suggest, but does not compel, an interpretation that the two uses of the word are coextensive.

Ibid. Given this ambiguity, Judge Duncan concluded that deference to DOL's interpretation of its own regulation is "appropriate" under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). Pet. App. 19a. Judge Duncan also stated that she was not persuaded by "any suggestion that the inconsistencies in the DOL's interpretation of the regulation over time must lessen the level of deference to be accorded its present view." *Id.* at 20a (citing *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007)).

DISCUSSION

The court of appeals erred in rejecting the Department of Labor's interpretation of Section 825.220(d). That interpretation is consistent with the regulation's text, DOL's practice under the FMLA, and judicial precedent construing every federal employment statute other than the FLSA to permit private settlements of claims. The court of appeals' decision also casts doubt on the validity of FMLA releases routinely negotiated by employers and employees, and imposes an unauthorized burden on both DOL and the federal courts to su-

pervise such settlements. In addition, the court of appeals' holding directly conflicts with the Fifth Circuit's holding in *Faris* v. *Williams WPC-I, Inc.*, 332 F.3d 316, 321 (2003). The decision also conflicts with this Court's precedent requiring deference to an agency's permissible interpretation of its own regulation. Final promulgation of DOL's proposed amendments to the regulation, however, would resolve the issue on a prospective basis and obviates the need for this Court's review. Accordingly, the petition for certiorari should be denied.

1. a. The court of appeals erred in its interpretation of the DOL regulation. Under this Court's well-established precedent, an agency's permissible interpretation of its own regulation is entitled to controlling deference. See, *e.g.*, *Federal Express Corp.* v. *Holowecki*, 128 S. Ct. 1147, 1155 (2008); *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007); *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). As Judge Duncan noted in dissent, once DOL set forth its interpretation of Section 825.220(d) in an amicus brief, the question in this case became not whether the court of appeals' opinion in *Taylor I* represented a reasonable interpretation of the regulation, but rather whether the court's interpretation was "compelled by the language of the regulation." Pet. App. 19a.

The Fourth Circuit's interpretation was not compelled. To the contrary, the regulatory text supports DOL's interpretation as prohibiting only the prospective waiver of FMLA rights, not the settlement of FMLA claims based on allegations of past violations. The regulation, on its face, addresses only the waiver of FMLA *rights* and makes no mention of the settlement or release of *claims*. That language is predicated on an important and well-understood dichotomy: the ability of

an employee to settle disputes based on *past* employer misconduct (settlement of claims) versus the inability of an employee to agree to permit his employer to engage in *future* misconduct (waiver of rights). See, *e.g.*, *DiBiase* v. *SmithKline Beecham Corp.*, 48 F.3d 719, 729 (3d Cir.) (The court of appeals corrected an error "in large part due to the conflation of the notion of a 'right' with the notion of an accrued 'claim.' A right to be free prospectively from certain forms of discrimination always is worth something; however, whether a person has accrued a claim based on a right depends entirely on what previously has occurred."), cert. denied, 516 U.S. 916 (1995).

The court of appeals cited the preamble published by DOL when Section 825.220(d) was adopted as support for its conclusion that the regulation prohibits the settlement of claims based on past conduct. Pet. App. 13a-16a. The preamble noted that certain business interests had "recommended explicit allowance of waivers and releases in connection with settlement of FMLA claims and as part of a severance package (as allowed under Title VII and ADEA claims, for example)." 60 Fed. Reg. at 2218. DOL responded by stating only that "prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the FLSA." *Ibid.* This preamble language is ambiguous. To the extent it is read as rejecting the comments it received, it lends support to respondent's position. But the preamble does not respond in terms to the comments requesting express allowance of the settlement of FMLA claims in a severance agreement, and its failure to do so is consistent with DOL's position that the regu-

lation and its use of the waiver of rights phraseology, rather than the settlement of claims language used to describe the comment, does not explicitly bar the retrospective compromise of claims. And, as in the regulation itself, the examples of prohibited waivers in the preamble address only the prospective waiver of "rights." *Id.* at 2219. In all events, a contemporary but ambiguous preamble does not trump a current and unambiguous interpretation of the regulation's operating text. A contrary rule would conflict with principles of *Auer* deference. See, *e.g.*, *Long Island Care*, 127 S. Ct. at 2349.

Moreover, the preamble's discussion of the permissibility of early-out retirement programs underscores the problem with equating the waiver of FMLA rights with the settlement of FMLA claims under Section 825.220(d). The preamble states that "an employee on FMLA leave may be required to give up his or her remaining FMLA leave entitlement to take an early-out offer from the employer. Under these circumstances, FMLA rights would cease because the employment relationship ceases." 60 Fed. Reg. at 2219. If, as is implicit in the court of appeals' reasoning in this case, the phrase "rights under FMLA" in Section 825.220(d) encompasses the assertion of an FMLA claim based on past employer actions, then, by stating that FMLA *rights* cease with the employment relationship, DOL would have been indicating that an employee's ability to assert an FMLA *claim* also ends with the termination of her employment. DOL could not have intended such a result; rather, it was clearly referring only to an employee's future right to continue on FMLA leave and

return to her position, not to her filing of a claim based on past employer actions.[2]

Contrary to the Fourth Circuit's suggestion, DOL has never interpreted Section 825.220(d) as restricting the settlement of FMLA claims based on past conduct. Rather, based on longstanding judicial precedent encouraging the settlement of employment claims, see, *e.g.*, *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981), DOL has interpreted Section 825.220(d) to bar only the prospective waiver of FMLA rights and not the retrospective settlement of FMLA claims. The only settlements of FMLA claims that DOL has ever reviewed are those involving complaints filed directly with and investigated by the Wage and Hour Division of DOL, in accordance with Section 2617(b)(1).[3]

In sum, because DOL's interpretation of its regulation reflects "the agency's fair and considered judgment on the matter in question," it is entitled to controlling deference. *Auer*, 519 U.S. at 462; see *Long Island Care*, 127 S. Ct. at 2349 (deferring to Secretary's interpretation of regulation because it reflected DOL's "considered views"). The court of appeals' failure to accord

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[2] Early-out retirement programs normally require employees to execute a general release of claims related to their employment. See S. Rep. No. 263, 101st Cong., 2d Sess. 60 (1990). The fact that DOL did not address the impact of Section 825.220(d)'s waiver prohibition on such releases in its discussion of those programs in the preamble further supports the conclusion that DOL viewed the settlement of FMLA claims as outside the prohibition.

[3] As Judge Duncan noted (Pet. App. 20a), even if DOL's interpretation of Section 825.220(d) had changed over time—and it has not—that would not lessen the deference to which the current interpretation is due. See *Long Island Care*, 127 S. Ct. at 2349 ("change in interpretation alone presents no separate ground for disregarding the Department's present interpretation").

such deference to DOL's interpretation of its own regulation contravenes this Court's well-established precedent.

b. DOL's interpretation of the regulation as barring only prospective waiver of FMLA rights is consistent with this Court's decisions in employment-law cases disfavoring prospective waivers of rights while encouraging the settlement of claims. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974) (recognizing that an employee may forgo his Title VII cause of action as part of a voluntary settlement, but cannot prospectively waive his rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*). It is also consistent with court of appeals decisions construing virtually every other federal employment statute to encourage private settlements of claims, while prohibiting prospective waivers of statutory rights. See, *e.g.*, *United States* v. *North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (Title VII); *Rivera-Flores* v. *Bristol-Myers Squibb Caribbean*, 112 F.3d 9, 11 (1st Cir. 1997) (Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*); *Runyan* v. *National Cash Register Corp.*, 787 F.2d 1039, 1043 (6th Cir.) (Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*), cert. denied, 479 U.S. 850 (1986).

The sole exception is for FLSA claims. The court of appeals stressed the FLSA analogy and followed decisions of this Court prohibiting private settlements of FLSA claims. Pet. App. 11a. That reasoning was erroneous.

First, the prohibition against private FLSA settlements is based on policy considerations unique to that statute. See *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981); *D.A. Schulte, Inc.* v.

Gangi, 328 U.S. 108, 114-115 (1946); *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 706-707 (1945). The FLSA is a broad remedial statute setting the floor for minimum wage and overtime pay and was intended to protect the most vulnerable workers, who lacked the bargaining power to negotiate a fair wage or reasonable work hours with their employers. See *id.* at 706-707.

By contrast, the policy considerations underlying the settlement of FMLA claims are much more akin to those underlying Title VII, the ADA, and the ADEA, all of which have been construed to permit unsupervised settlement of claims. See *North Carolina*, 180 F.3d at 581; *Rivera-Flores*, 112 F.3d at 11; *Runyan*, 787 F.2d at 1043.[4] Like those statutes, the FMLA is not primarily focused on hourly-workers and their wages, but protects all segments of the workforce, from low-wage workers to highly paid professionals. Also, unlike the FLSA, almost all claims under the FMLA are individual claims, generally brought by employees who have been terminated or denied reinstatement and are seeking damages and equitable relief. Such individual claims are particularly well-suited to private settlement.

Second, the FMLA's reference in Section 2617(b)(1) to the FLSA's enforcement scheme provides the Secretary the authority to establish the same administrative

[4] When Congress decided to regulate settlements under the ADEA in 1990, it enacted a specific statutory provision for that purpose. See Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, § 201, 104 Stat. 983 (29 U.S.C. 626(f)). That provision delimited the elements necessary to establish a knowing and voluntary settlement of ADEA claims. Even after OWBPA, ADEA claims remain subject to unsupervised settlement, so long as the conditions set forth in Section 626(f) are met. The FMLA, which was enacted after the OWBPA amended the ADEA, is notably devoid of any statutory provision restricting the voluntary settlement of claims.

complaint procedure that she utilizes under the minimum wage and overtime provisions of the FLSA. It does not, however, require the Secretary to supervise all FMLA settlements—a unique requirement premised on judicially-imposed restrictions on private settlements under the FLSA. In 1949, after this Court's first decisions prohibiting releases or compromises of FLSA claims (see p. 13-14, *supra*), Congress amended the FLSA to authorize the Secretary to supervise settlements of FLSA claims. 29 U.S.C. 216(c). Congress did not enact a comparable provision in the FMLA; indeed, nothing in either the FMLA or its regulations authorizes the scheme of DOL and court supervision of private settlements contemplated by the Fourth Circuit. Even the ADEA, which includes an enforcement provision that expressly refers to the section of the FLSA that contains the FLSA's "supervised" settlement provision, see 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title."), has not been construed to prohibit unsupervised settlements. See *Runyan*, 787 F.2d at 1043.

Third, the court of appeals erred in reading DOL's general reference in the preamble to "other labor standards statutes such as the FLSA," 60 Fed. Reg. at 2218, as a statement of DOL's intent to engraft the FLSA's unique settlement restrictions onto the FMLA. As the district court in this case concluded, if DOL intended those restrictions to apply to FMLA claims, it would have referred *only* to the FLSA (and, more specifically, to its "supervised" settlement provision in Section 216(c)), as opposed to referring to "other labor standards statutes" generally. Moreover, DOL has never es-

tablished a system for reviewing FMLA settlements in which no administrative complaint has been filed, something it would have done had it intended Section 825.220(d) to require such supervision.

None of this is to say that the regulation or its preamble is free from ambiguity or could not be written more clearly. And, indeed, DOL has proposed clarifying regulations. See *supra*, pp. 3-4. This is to say, however, that the regulatory language does not unambiguously mandate the FLSA analogy upon which the court of appeals seized.

2. a. The court of appeals' decision creates a direct conflict with the Fifth Circuit as to the scope of Section 825.220(d). Compare Pet. App. 3a ("[T]he plain language of section 220(d) precludes both the prospective and retrospective waiver of all FMLA rights, including the right of action (or claim) for a past violation of the Act."), with *Faris*, 332 F.3d at 321 ("A plain reading of the regulation is that it prohibits prospective waiver of rights, not the post-dispute settlement of claims.").

In *Faris*, the Fifth Circuit considered whether a severance agreement stating that the employee agreed to waive "claims arising under any * * * federal * * * law" barred her subsequent FMLA claim for retaliation. 332 F.3d at 318. The court concluded that "the proper reading of [Section 825.220(d)] is that it does not apply to post-dispute claims for damages under the FMLA." *Id.* at 319.[5] Therefore, as the law presently stands, em-

[5] The Fifth Circuit also stated that "th[e] regulation applies only to waiver of substantive rights under the statute, such as rights to leave, reinstatement, etc., rather than to a cause of action for retaliation for the exercise of those rights." *Faris*, 332 F.3d at 320. Contrary to the court of appeals' suggestion in this case (Pet. App. 6a-7a), and as DOL explained in an amicus brief filed in *Dougherty* v. *TEVA Pharma-*

ployees and employers cannot privately settle FMLA claims for past violations of the Act in the Fourth Circuit but can do so in the Fifth Circuit.[6]

In addition, since the court of appeals' first opinion in this case, at least five district courts in other circuits have addressed the application of Section 825.220(d) to settlement agreements and have reached differing conclusions. Three district courts have expressly declined to follow the court of appeals' decisions in this case. See *Dougherty* v. *TEVA Pharm. USA, Inc.*, No. 05-cv-2336, 2007 WL 1165068, at *6 (E.D. Pa. Apr. 9, 2007) ("Section 825.220(d) does not prohibit an employee from waiving *past* FMLA claims as part of a severance agreement or settlement."); *Dougherty II*, *supra*, at *1 n.2 (declining to follow *Taylor II* because "(1) the majority's analysis of Section 825.220(d)'s text and administrative history is unpersuasive; and (2) the majority did not sufficiently defer to the DOL"); *Hicks* v. *John F. Murphy Homes, Inc.*, No. 07-cv-121, 2008 WL 216511, at *1 (D. Me. Jan. 25, 2008) (rejecting defendant's request to reinstate action for court approval of settlement agreement releasing FMLA claims because *Taylor* does not reflect the law in the First Circuit and court approval of FMLA releases therefore is not required); *Jones* v. *Qwest*

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ceuticals USA, Inc., No. 05-cv-2336, 2008 WL 508011 (E.D. Pa. Feb. 20, 2008) (*Dougherty II*), DOL has never endorsed that distinction. See Gov't Amicus Br. 4 n.6, *Dougherty II*, *supra* (No. 05-cv-2336). Rather, DOL construes the regulation as barring the *prospective* waiver of *any* right under the FMLA (including the right to be free from retaliation or to sue for FMLA violations based on *future* employer misconduct).

[6] At least two other courts of appeals have approved the validity of private settlements of FMLA claims, though without addressing Section 825.220(d). See *Halvorson* v. *Boy Scouts of Am.*, 215 F.3d 1326 (6th Cir. 2000) (table); *Schoenwald* v. *ARCO Alaska, Inc.*, 191 F.3d 461 (9th Cir. 1999) (table).

Commc'ns Int'l, Inc., No. 07-cv-02284, 2008 WL 1902670 (D. Colo. Apr. 28, 2008) (agreeing with *Hicks*). Another district court approved a settlement agreement but noted that it "does not necessarily conclude that its prior approval is necessary to the parties' settlement of the FMLA claim." *Bieber* v. *THK Mfg. of Am., Inc.*, No. 06-cv-481 (S.D. Ohio Oct. 22, 2007), slip op. 2. And one district court has followed the court of appeals' decision in this case. See *Brizzee* v. *Fred Meyer Stores, Inc.*, No. CV04-1566, 2006 WL 2045857, at *11 (D. Or. July 17, 2006) (holding that a release in a severance agreement was unenforceable under Section 825.220(d) in the absence of DOL or court approval); *Brizzee*, No.CV04-1566, 2008 WL 426510, at *1 (D. Or. Feb. 13, 2008).

b. The court of appeals' decision prevents employers from settling claims with finality and employees from obtaining payments through such settlements without the inevitable delay of seeking court or DOL approval. The uncertainty created by the court's decision also may discourage employers nationwide from offering settlement or severance agreements, thereby prompting increased litigation and reducing or eliminating the additional compensation employees often receive under such agreements.

In addition, the court of appeals' decision imposes an unnecessary burden on DOL and the federal courts to supervise agreements settling or releasing any FMLA claims. In order to meet the requirements of the decision in the Fourth Circuit, DOL would have to allocate significant resources to establish a process for reviewing settlement of FMLA claims that are not pending in court. The resulting shift of resources from investigating complaints to supervising private-party settlements would likely result in substantial delays for those em-

ployees who have filed complaints with, and are relying on, DOL to protect their rights under the FMLA.

3. Notwithstanding the circuit conflict and the legal and practical problems with the court of appeals' interpretation of Section 825.220(d), plenary review is not necessary at this time. As pointed out above (pp. 2-3, *supra*), on February 11, 2008, DOL published a Notice (73 Fed. Reg. 7876) proposing, *inter alia*, to clarify that, under Section 825.220(d), "employees and employers should be permitted to voluntarily agree to the settlement of past claims without having to first obtain the permission or approval of the Department or a court," 73 Fed. Reg. at 7901. The period for public comment on the proposed regulations closed on April 11, 2008, *id.* at 7876, and DOL is currently in the process of reviewing the submitted comments.

If the revised version of Section 825.220(d) is adopted in final form, it would eliminate any ambiguity in Section 825.220(d), resolve the question presented in this case, and effectively abrogate the Fourth Circuit's decision—at least on a going forward basis. For that reason, and because there is only a one-one circuit split under the current regulation, review of the question presented is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

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PROGRESS ENERGY, INC.,

Petitioner,

v.

BARBARA TAYLOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE ASSOCIATION OF CORPORATE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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CORPORATE DISCLOSURE STATEMENT

The Association of Corporate Counsel is a non-profit corporation that has no parent corporation and no shareholders.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Association of Corporate Counsel ("ACC") is the in-house bar association, serving the professional needs of attorneys who practice in the legal departments of corporations and other private sector organizations worldwide. Since its founding in 1982, ACC has grown to include more than 22,000 individual in-house counsel members who work in more than 9,000 business entities worldwide. In the United States, ACC members are at work in every one of the Fortune 100 companies. ACC has an Employment and Labor Law Committee with over 5,000 attorney members.

One of the primary missions of the ACC is to act as the voice of the in-house bar on matters of concern to corporate legal departments, and matters implicating the ability of its members to fulfill their functions as legal counselors to their corporate clients. As ACC's mission statement proclaims, "The Association of Corporate Counsel promotes the common professional and business interests of attorneys who are employed to practice law by corporations, associations, and other private-sector organizations by developing and disseminating information . . . and engaging in advocacy on behalf of the in-house bar."

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[1] This brief is filed with the written consent of all parties. Counsel for the Association of Corporate Counsel states that they authored this brief. No person or entity other than the association, its members, and its counsel, made any monetary contribution to fund the preparation or submission of this brief.

Many ACC members are responsible for providing advice on employment law issues to businesses which must comply with the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* ("FMLA"). In a 2006 survey, members of the ACC identified FMLA compliance as the single employment law issue of greatest concern to them. Because of its members' interest in the FMLA, the ACC has expressed its views to the United States Department of Labor ("DOL") on the difficulty in making determinations as to full compliance with the obligations imposed by the FMLA.

As in-house counsel on workplace law issues for the Nation's corporations, the ACC shares, as *amicus curiae,* its unique perspective regarding interpretation of the FMLA, the impact of the uncertainty brought about by the Fourth Circuit's decision in *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007), *reinstating* 415 F.3d 364 (4th Cir. 2005), and the circuit conflict thus created with respect to the validity of waivers and releases of claims arising under the FMLA.

SUMMARY OF ARGUMENT

The ACC is concerned about the damage wrought by uncertainty over the ability of employers and employees to resolve actual and potential FMLA disputes. In many ways, the Nation is just beginning to grapple with the enormously important societal,

business and legal implications surrounding an employer's obligation to provide job-protected leaves for an employee's own illness or to fulfill family caregiver responsibilities. The precise contours of this obligation will be the subject of litigation for many years. As the DOL and courts work through those issues, there must be an escape route for employees and employers having no desire to be trapped in the disruption, expense and uncertainty of employment litigation.

The ability to settle FMLA claims provides that escape route, but only so long as the process is clear, and the resulting waiver is enforceable. The current split of authority resulting from the Fourth Circuit's decision below eliminates this certainty, depriving all FMLA stakeholders of the escape route, essentially encouraging litigation despite the willingness and desire of an employer and employee to resolve a disputed claim without resort to the courts. Furthermore, the Fourth Circuit's ruling casts doubt over the ability, and willingness, of employers to enter into individual and group separation agreements, where the ability to secure a general release (and thereby avoid future litigation) is the *sine qua non* for generous separation payments and benefits. Not only will this uncertainty discourage employers from pre-litigation resolution of claims arising under the FMLA, but it will interfere with pre-litigation settlement of claims which are frequently intertwined with FMLA claims, e.g., claims arising under the Americans with Disabilities Act ("ADA"), Title VII of the

Civil Rights Act of 1964 ("Title VII"), the Pregnancy Discrimination Act ("PDA"), the Equal Pay Act ("EPA"), the Employee Retirement Income Security Act of 1973 ("ERISA"), and a host of state laws.

The conflict created by the Fourth Circuit's central holding – that without prior DOL or court approval, waivers or releases of rights under the FMLA are unenforceable – places in doubt additional matters which are critical to an employer's willingness to resolve privately FMLA and related claims:

- Can FMLA claims be waived under any circumstances?
- Can some, but not other, FMLA claims or rights be waived?
- Will a court have Article III jurisdiction over an action brought solely to approve an FMLA waiver?
- Will the DOL have and dedicate the resources to evaluate and approve FMLA waivers and, if not, how can parties secure approval of FMLA waivers?

The confusion and uncertainty stemming from these questions likely will grow, exacerbating the conundrum faced by in-house counsel and other FMLA stakeholders. Furthermore, the decision below causes additional difficulties by undermining employers' ability to rely upon an agency's interpretation of its own regulations. The ACC respectfully asks this Court to grant certiorari to resolve the uncertainty surrounding

the ability of employers and employees to enter into agreements containing enforceable FMLA waivers, thereby allowing all FMLA stakeholders to benefit from knowledge of certain processes to follow in the private, pre-litigation resolution of FMLA and related claims.

ARGUMENT:

REASONS FOR GRANTING THE PETITION

A. The Circuit Conflict Harms Employers and Employees by Limiting Their Ability to Avoid Litigation Over Exceedingly Complex FMLA Compliance Issues.

The conflict created by the Fourth Circuit's decision below upsets an important workplace dynamic. Today, current and former employees willingly and often enthusiastically agree to resolve definitively all potential claims against their employers in exchange for agreed upon consideration. In these arrangements, employers purchase one precious commodity – certainty. The finality provided by such agreements benefits all concerned. The circuit conflict resulting from the decision below eviscerates certainty. Given the high usage of FMLA leave and complexity of FMLA and leave-related claims, this new uncertainty eliminates the opportunity to obtain this bargained-for exchange, and will drive unwanted litigation that serves no one's interests.

1. Employers and Employees Alike Benefit From Certainty Concerning Their Ability to Resolve FMLA Claims Without Litigation.

While ACC believes the Fifth Circuit's holding in *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003) and the DOL's interpretation of its own regulation concerning the validity of FMLA waivers are correct, the current uncertainty as to the ability of employers and employees to resolve substantive disputes about FMLA rights and obligations without resort to litigation is enormously disruptive.

Settlement agreements, and separation agreements containing releases of legal claims, have become a staple in workplace relations. Uncertainty as to their validity disadvantages both employees and employers. Releases of statutory workplace rights are used in many contexts, including individual and group severance agreements, as well as pre-litigation settlement of workplace claims. As a result of the Fourth Circuit's ruling below, employers are increasingly reluctant to enter into agreements containing releases of FMLA claims given the uncertainty concerning their enforceability. In response to a survey by ACC of its members with respect to the impact of the decision below, the following situations were disclosed:

- A financial services company employing approximately 10,000 employees and which normally executes more than 600 agreements a year containing FMLA

waivers has been unable to complete some settlements because of the uncertainty over the validity of FMLA waivers.

- Another financial services company employing approximately 31,000 employees has become hesitant to enter into any agreements resolving FMLA claims even where employees also would like to resolve the disputes.

- A hospitality company employing approximately 90,000 employees has become more conservative on settlements and is allowing cases to go to litigation before obtaining a settlement approved by a court.

- A manufacturing company employing approximately 18,000 employees has removed all references to FMLA waivers in its releases and accepted the reality that they may still be sued for such claims.

- A manufacturing company employing approximately 3,000 employees has become more reluctant to enter into settlement agreements because of the uncertainty in the state of the law governing FMLA waivers.

The difficulties are compounded by the fact that the FMLA overlaps in some respects with other federal and state laws. The ADA, in particular, is implicated when an employee takes FMLA leave due

to the employee's own serious health condition. FMLA "family" leave overlaps with an even broader range of "family responsibilities discrimination" laws. Family responsibilities discrimination ("FRD") is reportedly one of the fastest growing theories of employment claims.[2] Caregivers can bring FRD claims under Title VII as gender or race discrimination, under the Pregnancy Discrimination Act as pregnancy discrimination, or under the Americans with Disabilities Act as disability or "association" discrimination. Claims also could be brought under the Equal Pay Act or ERISA. In addition, various state statutes (leave statutes, discrimination statutes, and workers' compensation laws) provide other causes of action often intertwined with FMLA claims.

The Fourth Circuit's ruling leaves employers around the country with significant uncertainty around the use of termination programs involving releases and severance. The Bureau of Labor Statistics reports that since 2005, U.S. employers have engaged in over

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[2] Studies show that there has been an increase of over 400% in claims asserted by family caregivers in the last decade, while the increase in all other discrimination claims during the same period was 23%. *See* Joan C. Williams and Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 The Labor Lawyer 293, 295 (2007). Recently the Equal Employment Opportunity Commission issued *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007). *See* http://www.eeoc.gov/policy/docs/caregiving.html. The EEOC observed that the FMLA is only one of several statutes supporting legal claims that may be asserted on behalf of family caregivers.

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BARBARA TAYLOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a not-for-profit corporation that has neither a parent nor stockholders.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses, representing an underlying membership of more than three million businesses and organizations, with direct members of every size in every industrial sector and geographic region of the country. A principal function of the Chamber is to advocate the interests of the business community in courts across the Nation by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses. The Chamber has participated as *amicus curiae* in numerous cases before this Court that have raised issues of vital concern to the Nation's businesses, including cases construing federal employment statutes and regulations of the Department of Labor ("Department"). *See, e.g.*, *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004); *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003); *Auer v. Robbins*, 519 U.S. 452 (1997).

The Chamber has long been a strong advocate of national uniformity in federal law. The predictability engendered by a uniform federal legal scheme promotes efficient business operations, especially in the area of employer/employee relations, and protects businesses against the costs and risks of navigating a maze of inconsistent interpretations of federal laws.

The question presented in this case–namely whether, despite the Department's contrary interpretation, a Department regulation prohibits employees from retrospectively releasing claims under the Family Medical Leave Act (FMLA) without the approval of the Department or a federal court–directly implicates the Chamber's interest in a predictable and uniform federal legal scheme. Because the Fourth Circuit's decision, which is in conflict with decisions of other courts of appeals permitting unsupervised releases of FMLA claims, *see Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003); *Halverson v. Boy Scouts of Am.*, No. 99-5021, 2000 WL 571933 (6th Cir. May 3, 2000); *Schoenwald v. Arco Alaska, Inc.*, No. 98-35195, 1999 WL 685954 (9th Cir. Aug. 30, 1999), will have far-reaching and disastrous implications for countless businesses that depend upon the certainty, predictability, and uniformity of federal law, the Chamber and its members have a strong interest in the Court granting plenary review and correcting the erroneous judgment of the court below.[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the Chamber, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notice, and have consented to the filing, of this *amicus* brief, and their consent letters are on file with the Clerk's office.

SUMMARY OF ARGUMENT

This case poses the important, recurring national question whether employees may execute valid and binding FMLA releases. Specifically, 29 C.F.R. 825.220(d) provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. 825.220(d). The Department reasonably interpreted this regulation as reflecting the well-established distinction between a forward-looking "right" and a backward-looking "claim," *see, e.g., DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 729 (3d Cir. 1995), explaining: "[S]ection 220(d) bars only the prospective waiver of FMLA rights, not the settlement of FMLA claims based on past conduct." Br. for the Secretary of Labor as *Amicus Curiae* In Support of Defendant-Appellee's Petition For Rehearing En Banc, at 4, *Taylor v. Progress Energy, Inc.*, No. 04-1525 (4th Cir. July 16, 2007) [hereinafter "DOL Brief I"]. The Fourth Circuit, however, rejected the Department's interpretation of its own regulation, instead holding that Section 220(d) "prohibits both the prospective and retrospective waiver of any FMLA right . . . unless the waiver has the prior approval of the DOL or a court." Pet. App. 31a. The question before this Court, therefore, is whether, contrary to the Department's own position, Section 220(d) precludes employees from releasing their FMLA claims without Department or court approval.

As the petition explains, the traditional reasons for granting certiorari are clearly present here: The decision implicates a split among the federal courts of appeals concerning an important and recurring question of federal law. But *amicus* wishes to

highlight additional reasons why it is important for this Court to grant certiorari, and to grant it now. In particular, the Fourth Circuit's rule, if allowed to stand, will undermine tens (if not hundreds) of thousands of releases entered into between employers and employees as part of reductions in force, private settlements, and voluntary separation programs. In so doing, it will impose significant and entirely unnecessary costs on the federal government, the judiciary, employers, and indeed, the very employees whom the Fourth Circuit's rule purports to protect. This result simply cannot be justified by the legal rationale asserted by the Fourth Circuit–a rationale that, as demonstrated below, is inconsistent with the text of Section 220(d), the Department's official interpretation and historical practice, and indeed, the Fourth Circuit's own reasoning in this case.

Accordingly, this Court should grant certiorari now to address the circuit split and to mitigate the enormous costs that the Fourth Circuit's rule will impose on the national economy if left uncorrected.

ARGUMENT

I. THE DECISION BELOW CREATES SUBSTANTIAL UNCERTAINTY FOR BUSINESSES AND EMPLOYEES AND IMPOSES UNNECESSARY COSTS ON THE NATIONAL ECONOMY.

The Fourth Circuit's rule throws into legal limbo tens (if not hundreds) of thousands of validly executed releases because there is currently no mechanism in place for such releases to be approved. Moreover, the Fourth Circuit's holding significantly

increases the costs of such releases, to the detriment of both employers *and* employees. These harms are exacerbated by the circuit split, since many employers, including many of the Chamber's members, are national corporations that operate in the Fourth, Fifth, and other Circuits. Accordingly, this Court's immediate intervention is necessary to prevent the harm that the Fourth Circuit's rule would impose on employers, employees, and the national economy.

1. Each year, literally thousands of businesses and their employees voluntarily enter into releases identical to the one at issue in this case. For example, businesses commonly elect to ease the financial impact of reductions in force by offering severance benefits to separated employees. Because, in the absence of a preexisting contractual obligation, businesses are not legally obligated to provide these benefits, they understandably request that employees who voluntarily accept such benefits provide valuable consideration in return. Ordinarily, the one thing of value that an outgoing employee can provide is a general release of all claims against the employer. It is thus standard practice for employers to condition severance benefits on the execution of such releases as part of severance agreements with separated employees. *See* ETHAN LIPSIG & MARY C. DOLLARHIDE, DOWNSIZING 129 (1996) ("It normally is imprudent for an employer to pay significant severance or exit incentive benefits to employees unless, in exchange for those benefits, the employees execute releases of any claims they may have against the employer and related parties.").

Department statistics bear out the breadth of this standard business practice. The Department's Bureau of Labor Statistics recently reported that, in the 2006 calendar year, businesses took 13,998 "mass layoff events," defined as layoffs of 50 or more employees. U.S. Dep't of Labor, Bureau of Labor Statistics, Mass Layoffs In December 2006 And Annual Totals For 2006, at *3 (Jan. 24, 2007), *available at* ftp://ftp.bls.gov/pub/news.release/History/mmls.01242007.news (last visited Nov. 19, 2007). These events resulted in the separation of almost 1.5 million employees. *Id.* In September 2007 alone, businesses took 1,271 "mass layoff actions, seasonally adjusted," affecting a total of 123,656 employees. U.S. Dep't of Labor, Bureau of Labor Statistics, Mass Layoff Statistics, *available at* http://www.bls.gov/mls/home.htm (last visited Nov. 19, 2007). Even assuming conservatively that just ten percent of these "mass layoff events" involved severance agreements with general releases, this means that there were almost 150,000 such releases in 2006, and over 12,000 in September 2007, related to reductions in force alone.

In addition to these "mass layoff events," releases are standard in voluntary settlements of employment-related litigation, including litigation under the FMLA. Sound business judgment dictates that a business request a release of all employment-related claims as a condition of settling a suit brought under any of the myriad federal and state employment laws. The purpose of such a release is to protect the business from future litigation and to ensure the finality of the settlement agreement, while at the same time providing appropriate

remuneration and closure to the employee. For these same reasons, releases also are a common facet of early retirement and other voluntary separation programs.

In addition to general releases such as the one at issue in this case, businesses and employees frequently enter into releases to resolve specific claims, including claims under the FMLA. Such claim-specific releases are commonly utilized, for example, in *ongoing* employment relationships, where the employer and employee wish to settle a particular dispute but do not desire to end their relationship. The availability of both general and specific releases thus benefits businesses and employees by maximizing the avenues for settling employment-related disputes on mutually favorable terms.

In sum, businesses and employees execute countless releases that encompass FMLA claims each year as part of reductions in force, private settlements, and voluntary separation programs.

2. The Fourth Circuit's rule throws all of these releases into legal limbo. The Fourth Circuit held that releases of FMLA claims are invalid unless approved by a court or the Department. Pet. App. 31a. Even assuming that this qualification on the Fourth Circuit's rule is appropriate, *but see infra* Part II(3), there is currently no administrative mechanism in place to obtain such approval. As the Department has explained, "[t]he Department has never established a system for reviewing FMLA settlements in which no administrative complaint has been filed." Br. of the Secretary of Labor as *Amicus Curiae* In Support of Defendant-Appellee's

13,000 mass layoff actions affecting roughly 2.5 million workers. Employers offered many of these workers severance in exchange for a general release, in an effort to bring prompt closure to the relationship and provide transition assistance to affected families. The Fourth Circuit's ruling effectively handcuffs employers in the use of these termination programs by making releases significantly more tenuous.

In-house counsel seeking to protect clients from suit use waivers and releases to "close the book" on all workplace claims, known or unknown, as of a certain date. Partial releases are of less value to employers and, consequently, may be expected to provide the employee with less consideration. As a practical matter, uncertainty concerning whether and how FMLA claims can be resolved will discourage many employers from resolving ***any*** legal claims stemming from family and medical leaves. Some ACC members have confirmed their clients already are refraining from settling claims because of these concerns; others are contemplating reduction of severance benefits offered in exchange for releases.

In sum, uncertainty as to the value of FMLA releases will likely result in increased workplace litigation, in particular with respect to ADA and FRD litigation. By comparison, a return to the clarity and apparent certainty as to the validity of FMLA releases which existed prior to the ruling below would encourage enhanced separation packages designed to

eliminate the risk of litigation, and will not foster ADA and FRD litigation.

2. Since Most Employees Are Eligible and Likely to Use FMLA Leave, Certainty Concerning the Process to Resolve Disputed FMLA Claims Is of Growing Importance to Business.

More than half of all individuals working in the United States are eligible for FMLA leave. A significant number of workers also have chronic health conditions. A National Association of Manufacturers survey reported that "25 percent of those eligible for FMLA leave had medical certifications on file for 'chronic' illness that permitted unannounced, unscheduled intermittent leave." A survey by the U.S. Chamber of Commerce found "[l]arge companies reported having generally 15 percent of the workforce with active medical certifications for FMLA at any time." One company noted that 44 percent of its employees in one of its divisions had medical certifications and another one of its business groups saw a jump in medical certifications from 28 percent in 2005 to 42 percent in 2006. *Family and Medical Leave Act Regulations: A Report,* 72 Fed. Reg. 35549, 35622-26 (June 28, 2007) (citations omitted).

Employee awareness and use of FMLA appears to be increasing significantly. While 1999 survey data estimated that between 2.4 million and 6.1 million employees took FMLA leave each year, in 2005, that

number was "more likely to be between 6.1 million and 13 million." The trend of increased FMLA use is particularly strong in some industries. The Dallas Area Rapid Transit reported that employee FMLA absences increased from 1,965 workdays in FY 2003, to over 6,100 workdays in 2006. The City of New York reported that use of FMLA leave has increased from 10.8% of all medical leaves in 2001 to 27% in 2006. The National Association of Manufacturers (NAM) reported that, for one major auto parts manufacturer, applications for FMLA leave increased 150-fold in ten years. NAM also reported that, for this one major auto parts manufacturer, the use of intermittent leave increased five times more quickly than that for regular FMLA leave. *Id.* at 35623-26 (citations omitted). The trend toward increased FMLA usage, and increased FMLA litigation, makes the need to swiftly resolve the circuit conflict all the more pressing.[3]

[3] The DOL has conceded that "an area that may not have been fully anticipated [was] the prevalence with which unscheduled intermittent FMLA leave would be taken . . . by individuals who have chronic health conditions." About one quarter of all FMLA leave is taken intermittently and many employers report much higher rates. One company reported that 95% of FMLA leave requests were for intermittent leave, another reported 75%. Another reported that the number of intermittent leaves had grown almost 300% in one year. *Id.* at 35552, 35626.

3. Complexity Surrounding an Employer's Obligations Under the FMLA Leads to Many Disputed Claims, but the Circuit Conflict Impairs Employers' Willingness and Ability to Avoid Litigation.

That FMLA and other "leave management" issues raise thorny legal questions, which cry out for private settlement, is apparent. Many complex questions perplex employers attempting to discern their employees' rights and their own obligations. Among those frequently cited are the scope and nature of: 1) penalties under this Court's ruling in *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002); 2) what constitutes a serious health condition; 3) unscheduled intermittent leave; 4) employee rights to receive notice of their FMLA rights; 5) employee obligations to provide employers notice of their need for FMLA leave; 6) medical certification and verification; 7) the interplay between the FMLA and ADA; 8) transfers to an alternative position; 9) substitution of accrued paid time for unpaid FMLA leave; and 10) joint employment.

The interplay between FMLA and ADA, in particular, raises many additional complex issues, including: a) the interaction of the FMLA employee notice provisions and the ADA medical inquiry prohibitions; b) processes to obtain medical information under the FMLA and ADA; c) processes to follow under the FMLA and ADA to confirm an employee's fitness to return to work after FMLA leave; d) employee rights and obligations when employers offer

light duty, modified duty or transfers and reassignments under the FMLA and ADA; and e) permitting "reasonable leave for medical circumstances" under the FMLA and ADA.

In its conclusions regarding a July 2007 survey on the FMLA and its impact on organizations, the Society for Human Resource Management observed:

> Although certain provisions of the FMLA are favorable for both employees and employers, HR professionals have struggled with certain aspects of the FMLA, specifically those related to serious health conditions, intermittent use of leave and chronic or episodic conditions. Tracking/administering intermittent FMLA leave and determining whether an intermittent serious health condition should be protected by the FMLA were among the most difficult FMLA-related activities for organizations to administer. When HR professionals were asked to elaborate on FMLA requests that they believed were not legitimate, a number of comments were related to problems with administering intermittent leave and questioning the timing of intermittent leave.

Society for Human Resource Management, *FMLA and Its Impact on Organizations* 31 (2007).

The aforementioned statistics and trends, and the breadth of FMLA and related leave issues confronting employers, illustrate an undeniable reality – the FMLA, and "leave management" generally, is

steeped in legal nuances. This clash – between increased use of FMLA leave and the increased uncertainty surrounding employees' rights to take leave and employers' obligations to provide such leave – is at the heart of a rapidly growing number of disputed claims. These claims have been frequently resolved through private settlements and releases, thereby avoiding adding to the employment cases filling court dockets. The uncertainty created by the Fourth Circuit's decision, as to the ability of employers and employees to resolve such claims without litigation, renders them incapable of entering into effective settlements that are desired by both employers and their employees.

4. The Uncertainty Stemming From the Fourth Circuit's Ruling Promotes Disparate Treatment Within Corporate Workforces.

Some in-house counsel employed by the many companies operating in both the Fourth and Fifth Circuits feel compelled to use different separation or settlement agreements in different locations. There are obvious inequities in such an approach. For example, two FMLA-eligible employees performing the same job for the same rate of pay, and whose employment is being terminated for the same reason (as might be the case if a company engaged in a nationwide reduction in force), might be asked to execute different waivers merely because they live in different federal jurisdictions. To an employee untrained in FMLA

waiver jurisprudence, these disparities might be viewed as unlawful discrimination. From an employee's and manager's perspective, there is but one FMLA, and the rules regarding waiver of FMLA rights ought to be uniform regardless of where the employee works.[4]

As the Secretary of Labor proclaimed in her *amicus curiae* brief in support of Progress Energy's motion for reconsideration en banc below, "The consequences of the decision would be disastrous both for employers who want to settle claims with finality and for employees who want to obtain the compensation due to them promptly, without filing a lawsuit or seeking Department 'supervision.'" Brief for the Secretary of Labor as Amicus Curiae in Support of Appellee's Petition for Rehearing En Banc, at 4, *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007), *reinstating* 415 F.3d 364 (4th Cir. 2005) (No. 04-1525).

[4] Even those employers which utilize different agreements based on the Circuit in which the workplace is located may be unsuccessful in their efforts to avoid litigation, in that an employee working in one jurisdiction may nevertheless be capable of bringing an action against his or her employer in any of several jurisdictions. *See* 28 U.S.C. § 1391(b) and (c).

B. The Fourth Circuit's Decision Below Calls Into Doubt Employers' Ability to Rely Upon an Agency's Interpretation of Its Own Regulations.

Given short shrift by the panel majority in the Fourth Circuit's ruling below was the Secretary of Labor's interpretation of the regulation at issue. The court of appeals did not have the benefit of that interpretation when the initial ruling was rendered, and attempted to divine the agency's interpretation from the absence of express guidance. In response thereto the Secretary took the extraordinary step of appearing and filing an *amicus curiae* brief in support of Progress Energy's motion for reconsideration. The Secretary's grave concern over the impact of the court's construction of the regulation was reflected in the text cited above. In that *amicus curiae* brief, the Secretary clearly articulated the Department's interpretation, i.e., that the regulation at issue regulates *only* the prospective waiver of FMLA rights, not the retrospective settlement of FMLA claims.

With the benefit of the Department's interpretation before it, the issue before the Fourth Circuit changed, but only the dissenting panel member, Judge Duncan, acknowledged the significance of that development. "The course of this appeal was unexpectedly diverted, however, when the DOL rejected the analysis of *Taylor I* in its belated amicus brief supporting Progress Energy's petition for rehearing en banc . . . After such interposition, the question in the case was necessarily recast", citing *Auer v. Robbins,* 519 U.S.

452, 461 (1977). *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 463 (4th Cir. 2007) (Duncan, J., dissenting) [also quoted in Petition for a Writ of Certiorari, App. A at 18a, *Progress Energy, Inc. v. Taylor,* No. 07-539 (U.S. Oct. 22, 2007)].

The Nation's businesses struggle mightily in their efforts to comply with the FMLA. As set forth above, disputed claims are often resolved through settlement in order to avoid the expense, disruption and uncertainty of litigation. Similarly, businesses look to an administrative agency's regulations and interpretations thereof in order to evaluate the risk of an investigation or enforcement action initiated by an agency. While businesses may not concur with an agency's interpretation of a statute, they have been able to rely upon an administrative agency's interpretation of its own regulations to evaluate the likelihood of an agency enforcement action and mitigate legal risk in their employment practices. The Fourth Circuit's failure to afford appropriate deference to the Secretary of Labor's interpretation of the DOL regulation suggests that such reliance upon an agency's interpretation of its own regulations may be misplaced, and may not provide the "safe harbor" it was thought to offer in the past. Accordingly, review by this Court is appropriate to avoid such additional uncertainty.

CONCLUSION

Left unresolved, the conflict created by the Fourth Circuit's decision below will discourage employers and employees from resolving FMLA claims and related claims arising under other federal and state laws. Employers and employees attempting to follow the Fourth Circuit's direction to seek approval from the DOL or courts are likely to encounter frustration, as it appears likely that courts must deny jurisdiction due to the absence of a case or controversy, and that the DOL will decline to assist on the grounds that it lacks the process or resources to evaluate waivers. Review of the Fourth Circuit's ruling would help avoid these disruptive workplace challenges, and avoid imposition of an unnecessary burden upon the courts.

The Association of Corporate Counsel, as *amicus curiae,* respectfully urges the Court to grant the petition for a writ of certiorari.

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Petition For Rehearing En Banc, at 14, *Taylor v. Progress Energy, Inc.*, No. 04-1525 (4th Cir. Aug. 16, 2007). Consequently, the *only* way that employers and employees can validate releases is for the employee to file a lawsuit and then seek judicial approval of the settlement or other agreement that contains the release.

This unnecessary regime, if permitted to stand, will impose substantial costs on employers, employees, and the judiciary, ultimately harming the very people that the Fourth Circuit's rule is intended to protect.

Most significantly, by undermining the certainty that releases are intended to provide, the Fourth Circuit's rule decreases the value of releases. This, in turn, reduces the amount in severance and other benefits that employers are willing to pay employees for releases. *See* Muniza Bawaney, Note, *Signed General Releases May Be Worth Less Than Employers Expected: Circuits Split On Whether Former Employee Can Sign Release, Reap Its Benefit, And Sue For FMLA Claim Anyway*, 82 CHI.-KENT L. REV. 525, 546 (2007) ("[T]he ruling of the Fourth Circuit creates a disincentive for employers to offer separation benefits at all, because of the potential risk of employees accepting benefits only to turn around and sue.").

The Fourth Circuit's rule, in other words, harms the very class of people that it is intended to protect. For example, businesses will continue to implement reductions in force as economic conditions dictate–but because the Fourth Circuit's rule devalues releases of employment-related claims, businesses invariably will reduce or eliminate the benefits offered to

affected employees. As a consequence, the many employees who face involuntary separation will be deprived of substantial payments that might mean the difference between financial security and financial peril. *See id.* ("[M]assive layoffs will still occur if the economy demands it, but because of the Fourth Circuit's decision many of these laid off employees will have to go without the fat severance checks they would have had."). This outcome is particularly harmful to the overwhelming majority of employees who have no valid FMLA claim and who thus cannot recoup this lost value through FMLA litigation. For these employees, like all others, cannot, at the time of separation, provide the employer with certainty that they will not bring an FMLA claim in the future.

This devaluation of releases and the attendant harm to both businesses and employees extends beyond the reduction in force context. Under the Fourth Circuit's holding, *every* release that might encompass an FMLA claim–whether executed at the end of employment or during an ongoing relationship between the employer and employee–is subject to the approval requirement. The Fourth Circuit's rule thus diminishes the value of releases in *all* contexts, including reductions in force, private settlements, and voluntary separation programs, to the mutual detriment of employers and employees who desire to enter into such releases.

This harm to employers and employees cannot adequately be mitigated by the possibility of obtaining judicial approval of the release. In order to obtain such approval, the employee must file a lawsuit against the employer and create a live case or

controversy. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This, however, will itself impose significant costs on both the judiciary, on the one hand, and employers and employees, on the other, thus further decreasing the value of releases and their attendant benefits.

First, lawsuits seeking approval of releases might well overwhelm the federal judiciary's already crowded docket. For example, the most recent available data shows that a total of 326,401 criminal and civil actions were filed in federal district courts in the fiscal year ending September 30, 2006, for a total of 464 weighted filings per authorized judgeship. *See* ADMIN. OFFICE OF THE U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 13, 28 (2006), *available at* http://www.uscourts.gov/judbus2006/contents.html (last visited Nov. 19, 2007). Given the almost 1.5 *million* separations due to mass layoffs *alone* in 2006, it is not difficult to predict the impact that the Fourth Circuit's rule would have on the judiciary's caseload.

Second, seeking judicial approval will impose significant litigation costs on employers and employees. In order to obtain court approval, an employee might feel the need to hire an attorney to file a lawsuit, and an employer would have to do likewise to defend it. This is obviously not costless and may, in fact, be so costly as to compel parties to forego releases altogether, particularly given the relatively small size of many severance packages and other benefits ordinarily exchanged for releases. In this case, for example, Ms. Taylor received approximately $11,718 in severance benefits in

exchange for her release. The litigation costs of judicial approval of a release of this size might well offset the value of the release entirely.

In short, because court approval is the only currently available mechanism for validating a release, the value of such a release to employers–and, hence, the amount that they will give employees in exchange for a release–is greatly diminished. This harm is particularly unwarranted given that it will also affect employees who never seek to assert an FMLA claim but nonetheless will be required to bear the financial burden created by the Fourth Circuit's rule, in the form either of reduced benefits received in exchange for a narrower release or of the costs of compliance connected with providing employers with a release that encompasses FMLA claims. Nothing in logic or law supports this untoward result.

3. In its opinion below, the Fourth Circuit expressed "confiden[ce]" that the Department would be able to remedy this state of affairs by adopting a new regulatory regime to quickly and efficiently approve releases. Pet. App. 16a. With all due respect, the Fourth Circuit's "confidence" is misplaced. In the first place, it is not at all clear that the Department will adopt the new regulatory regime envisioned by the Fourth Circuit. Moreover, even if the Department did elect to create such a regime, it would come at enormous cost to the federal government, employers, and employees.

First, it is not at all certain that the Department will undertake a new and burdensome regulatory regime given the limited resources available to it. Although the Fourth Circuit suggested that the Department's "broader experience in supervising

FLSA settlements" will minimize the burdens of the FMLA supervision regime, *id.* 16a, in fact, the opposite is true. In 2006, for example, the Department's Wage and Hour Division concluded 31,987 FLSA cases. *See* U.S. Dep't of Labor, Employment Standards Division, 2006 Statistics Fact Sheet, *available at* http://www.dol.gov/esa/whd/statistics/200631.htm (last visited Nov. 19, 2007). Given the 1.5 *million* separations due to mass layoff events in the United States each year, the increased burden on the Department would seem substantial indeed. Moreover, the Department's funding already takes into account its obligation under this Court's precedents to superintend certain FLSA releases–but, by contrast, the Department's funding does not contemplate a regulatory regime for approving FMLA releases. Thus, as the Department itself noted, the Fourth Circuit's approval rule "would . . . require the Department to reallocate significant resources that are currently used to investigate FMLA and other labor standards complaints." DOL Brief I, at 3.

Given this additional burden, the Department may well decide not to adopt the new regulatory regime called for by the Fourth Circuit. Nor, of course, could the Fourth Circuit require it to do so, since "courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA" or the organic law that the agency is charged with enforcing. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (citing *Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)). And, in any event, as the foregoing demonstrates, the financial burden that

this new regulatory regime would impose upon the federal government would be substantial.

Second, even if the Department did implement this costly new regulatory bureaucracy, those regulations would still impose significant unnecessary costs on employers and employees, all for no obvious purpose. The thousands upon thousands of releases and settlement agreements entered into each and every year, including agreements between businesses and employees in ongoing employment relationships, would now face a new regulatory requirement–one that requires such agreements to be submitted to and cleared by a regulatory agency before they can take effect. As any regulated entity can attest, the costs of complying with new regulatory obstacles is substantial indeed. And these costs will, again, ultimately decrease the value of releases and the attendant benefits for *all* employers and employees, regardless of whether the individual employee executing the release has a colorable FMLA claim.

In short, regardless of whether the Department adopts the regulatory regime suggested by the Fourth Circuit, the costs that the Fourth Circuit's rule would impose on the federal government, the federal judiciary, employers, and ultimately, employees, is substantial. This Court therefore should intervene to prevent these costs from being imposed on the national economy, all to the ultimate detriment of the very people that the Fourth Circuit's rule seeks to protect.

4. The Fourth Circuit appears to suggest that the Department can avoid these costs by amending its regulation to say what the Department already believes that it says. *See* Pet. App. 17a n.4 (noting

"that the DOL appears to have section 220(d) under consideration in connection with its rulemaking responsibilities under the FMLA"). This is simply not true. The Department has not yet proposed an amendment, and the adoption and implementation of any such amendment could be delayed for years by the rulemaking process and the resolution of any ensuing challenges under the Administrative Procedure Act ("APA"). For example, litigants like Ms. Taylor might well seek to challenge the retroactive application of this hypothetical amendment to the thousands of releases already executed, thus increasing the uncertainty surrounding these extant releases. *See* 5 U.S.C. 551(4) (defining a "rule" as "the whole or a part of an agency statement of general or particular applicability *and future effect*" (emphasis added)); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not . . . be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

Consequently, for the foreseeable future, employers and employees will continue under the legal cloud engendered by the Fourth Circuit's opinion. Not only will businesses and employees be left to languish in the uncertain legal milieu created by the Fourth Circuit's holding, but the scope and effect of tens (if not hundreds) of thousands of agreements containing employment-related releases also will be held in doubt. And if the eventual hypothetical amendment to the Department's regulation is not retroactively applied, a substantial portion of these agreements

will remain subject to the Fourth Circuit's erroneous rule.

5. These problems are only exacerbated by the split of authority between the Fourth and Fifth Circuits and the confusion among the district courts. *See* Pet. 11. Thousands of businesses, including many Chamber members, operate in multiple jurisdictions and do not know which of the Fourth and Fifth Circuits' divergent rules to follow. Additionally, because FMLA suits may be filed in multiple venues, including the employer's state of incorporation and places of business, *see* 28 U.S.C. 1391(b)(1) & (c), this split of authority creates a significant risk of intra-company forum shopping by employees whose previously resolved claims remain actionable in the Fourth Circuit but are barred elsewhere.

Consequently, this Court's immediate attention is warranted in order to prevent the significant negative impact that the Fourth Circuit's erroneous rule will exert on the federal government, the federal judiciary, employers, and ultimately, employees, and the attendant costs that it will necessarily impose on the national economy.

II. THE FOURTH CIRCUIT'S RULING IS FUNDAMENTALLY WRONG.

In addition to imposing significant costs on the national economy, the Fourth Circuit's rule is fundamentally flawed. It violates the strong public policy articulated by Congress and this Court in favor of private settlements of federal employment claims. It also violates fundamental principles of administrative law. These reasons further confirm

the necessity of this Court's immediate review of the Fourth Circuit's erroneous decision.

1. Federal law long has embodied a policy of encouraging private settlements of federal employment claims and, thus, of enforcing releases of such claims between businesses and employees. This Court has held, for example, that disputes under the Age Discrimination in Employment Act ("ADEA") "can be settled . . . without any . . . involvement" from administrative agencies or courts. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). Similarly, although "there can be no prospective waiver of an employee's rights under Title VII . . . presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974). Indeed, "[i]n enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see also Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986) (stating that Congress intended "voluntary action" to be the "preferred means of achieving the objectives of Title VII").

Lower federal courts have followed suit. The courts of appeals have consistently encouraged private settlements of federal employment claims and have routinely upheld unsupervised releases of such claims. *See, e.g., Rivera-Flores v. Bristol-Myers Squibb Caribbean*, 112 F.3d 9, 11 (1st Cir. 1997) ("Courts have, in the employment law context, commonly upheld releases given in exchange for additional benefits. Such releases provide a means of

voluntary resolution of potential and actual legal disputes, and mete out a type of industrial justice. Thus, release of past claims have been honored under [Title VII and the ADEA]."); *Kendall v. Watkins*, 998 F.2d 848, 851 (10th Cir. 1993) ("[A]n employee may agree to waive Title VII rights that have accrued."); *Gormin v. Brown-Forman Corp.*, 963 F.2d 323 (11th Cir. 1992) (collecting cases upholding the unsupervised settlement of ADEA claims); *Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1041-43 (6th Cir.) (en banc) (upholding unsupervised release of ADEA claim), *cert. denied*, 479 U.S. 850 (1986). This approach to federal employment claims comports with the broader federal policy of encouraging the private settlement of disputes rather than forcing resort to costly litigation. *See* Bawaney, *supra*, 82 CHI.-KENT L. REV. at 525 (noting the "general public policy favoring the post-dispute settlement of claims").

The Fourth Circuit's decision thus stands in opposition to the federal policy favoring private resolution of federal employment claims. In occupying this position, the Fourth Circuit not only made FMLA claims virtually unique to federal law, but it also severely undercut the ability of businesses and employees to use the most cost-effective means for resolving disputes, namely negotiated settlements. *See id.* at 545-48 (discussing how the Fourth Circuit's rule discourages FMLA settlements to the mutual detriment of businesses and employees); *see also* Rachel H. Yarkon, Note, *Bargaining in the Shadow of Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising From Termination of Employment*, 2 HARV. NEGOT.

L. REV. 165, 168-72 (1997) (discussing the benefits to both parties of a negotiated settlement in the employment discrimination context); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1350-51 (1994) (listing a number of benefits ranging from party satisfaction to cost-savings that result from settlement agreements); David M. Trubek, et al., *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72, 122 (1983) ("[B]argaining and settlement are the prevalent and, for plaintiffs, perhaps the most cost-effective activity that occurs when cases are filed.").

2. The Fourth Circuit's holding is not justified by analogy to the Fair Labor Standards Act (FLSA). The FLSA is unique among federal employment statutes in prohibiting the retrospective release of certain claims absent Department or court approval. *See D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114-15 (1946); *Brooklyn Sav. Bank v. O'Neill*, 324 U.S. 697, 706-07 (1945). That is why federal courts have *refused* to extend its approval rule to any other employment laws. *See Gilmer*, 500 U.S. at 28; *Alexander*, 415 U.S. at 52; *Rivera-Flores*, 112 F.3d at 11; *Runyan*, 787 F.2d at 1041-43.

In approving the idiosyncratic supervision rule for certain FLSA releases, this Court noted that "[n]either the statutory language, the legislative reports nor the debates indicates that the question at issue [*i.e.*, release of the claim for liquidated damages under the FLSA] was specifically considered and resolved by Congress." *Brooklyn Sav.*, 324 U.S. at 705-06 (footnotes omitted). Instead, the Court "resort[ed] to a broader consideration of the

legislative policy behind" the FLSA. *Id.* at 706. According to the Court, "the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lack sufficient bargaining power to secure for themselves a minimum subsistence wage." *Id.* at 707 n.18; *see also Gangi*, 328 U.S. at 116. Based upon this unique policy consideration, the Court effectively adopted a presumption that releases of certain claims under the FLSA were necessarily the product of unequal bargaining power and, therefore, that Congress intended altogether to prohibit such releases notwithstanding its silence on the matter. *See Runyan*, 787 F.2d at 1041-44.

The Fourth Circuit's extension of this approach to the FMLA was improper. The FLSA's minimum wage and maximum hour protections are, by definition, intended to protect the lowest paid and most vulnerable segment of the workforce. But this rationale is entirely inapplicable to laws, like the FMLA, that broadly apply to *all* segments of the workforce, no matter how powerful, highly paid, or well-educated. This is why the federal judiciary has repeatedly refused to extend the rationale of these cases to the ADEA, Title VII, or, for that matter, any other federal statute. *See Gilmer*, 500 U.S. at 28; *Alexander*, 415 U.S. at 52; *Runyan*, 787 F.2d at 1041-43.

In *Runyan*, for example, a panel of the Sixth Circuit employed reasoning similar to that relied on by the court below to conclude that the fact that the ADEA expressly references the FLSA's enforcement scheme warranted the extension of the FLSA's

supervision rule to the ADEA. *See* 787 F.2d at 1040. The en banc court, however, reversed the panel's ruling, explaining that "[t]he purposes behind enactment of the ADEA and the earlier enactment of the FLSA are . . . obviously different." *Id.* at 1043. The en banc court thus endorsed the practice of "effectuating and recognizing settlements of ADEA disputes that employees and employers have worked out in good faith without agency involvement." *Id.* It did so, moreover, even though "Congress, by referring to the FLSA enforcement provisions in enacting the ADEA, was aware of the judicial interpretation of the FLSA" creating the supervision rule. *Id.* at 1044.

As *Runyan* makes clear, there is simply no reason to presume, in the context of broad statutes like the ADEA, Title VII, and the FMLA, that releases are the product of unequal bargaining power. Instead, to the extent that any particular release is the product of such circumstances, it can be evaluated on a case-by-case basis pursuant to contract rules specifically adapted to that purpose. *See id.* at 1044-45 (noting that "courts should not allow employers to compromise the underlying policies of the ADEA by taking advantage of a superior bargaining position or by overreaching" and that "[o]rdinary contract principles would apply" to review of an ADEA release); *see also Faris*, 332 F.3d at 322 (holding that a court may invalidate an FMLA release where "the release was invalid because of fraud, duress, material mistake," or some other reason). But there is simply no reason to believe that in enacting the ADEA, Title VII, and the FMLA, Congress intended to *reverse* the strong public policy in favor of the private settlement of employment-related disputes. Indeed, as

explained above, the federal judiciary has repeatedly found to the contrary.

Consequently, the Fourth Circuit's rule simply cannot be supported by analogy to this Court's cases construing the unique policy underlying the FLSA.

3. The Fourth Circuit's ruling likewise violates basic principles of administrative law. The federal courts are required to defer to an agency's reasonable interpretation of its own regulations unless contrary to their clear and unambiguous text. *See Auer*, 519 U.S. at 461 (holding that deference to the Department's interpretation of its own regulation is warranted unless that interpretation is "plainly erroneous or inconsistent with the regulation"); *see also Beck v. Pace Int'l Union*, 127 S. Ct. 2310, 2317 (June 11, 2007) (reversing a lower court's rejection of a "reasonable" legal construction advocated by the Department and another federal agency). Here, however, not only did the Fourth Circuit reject the Department's interpretation of Section 220(d), but it went on to adopt an interpretation that is contradicted both by the regulation's text and the Department's longstanding regulatory practice.

The Department reasonably interpreted Section 220(d) as reflecting the well-established "distinction between" a forward-looking "right" and a backward-looking "claim." *DiBiase*, 48 F.3d at 729; *Faris*, 332 F.3d at 321 ("A plain reading of [section 825.200(d)] is that it prohibits prospective waiver of rights, not the post-dispute settlement of claims."). This distinction, for example, forms the basis of this Court's rule prohibiting prospective waivers of rights but not retrospective releases of claims under Title VII. *See Alexander*, 415 U.S. at 52; *see also* 29 U.S.C. 626(f)

(prescribing a "knowing and voluntary" standard for retrospective waivers and releases of an ADEA "right or claim").

The Fourth Circuit, however, while purporting to ground its rejection of the Department's interpretation of Section 220(d) on the regulation's plain and unambiguous text, went on to engraft upon that regulation a qualification that is inconsistent with both that text and the Department's consistent regulatory practice. In particular, the Fourth Circuit did not adhere to the logic of its textual analysis and interpret Section 220(d) as completely "prohibit[ing] both the prospective and retrospective waiver of any FMLA right." Pet. App. 31a. Instead, it held that Section 220(d) "prohibits both the prospective and retrospective waiver of any FMLA right ... *unless the waiver has the prior approval of the [Department] or a court.*" *Id.* (emphasis added).

But this latter qualification is flatly inconsistent with the plain text of Section 220(d), which, without exception or qualification, provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. 825.220(d). Either, as the Fourth Circuit's textual analysis implies, this text prohibits *all* waivers and releases of FMLA rights and claims, or, as the Department believes, it draws a distinction between a forward-looking "right" and a backward-looking "claim," with the regulation's prohibition extending only to the former. There is, however, no textually plausible middle ground, pursuant to which the regulation prohibits *all* waivers and releases of *any* right or claim *unless the Department or a court says otherwise.*

Moreover, the Fourth Circuit's interpretation of Section 220(d) is contrary to the Department's consistent application of that section since the day that it was promulgated in 1996. As discussed above, although the Department has adopted a procedure for approving certain FLSA releases, it pointedly has *not* adopted a similar procedure for FMLA releases, for the obvious reason that it never believed that such approval was necessary. Nor has the Department ever challenged the validity of a release that might encompass an FMLA claim in court on the ground that agency or judicial approval was required. It is thus clear through its historical practice that the Department has long *rejected* the interpretation of Section 220(d) adopted by the Fourth Circuit. *See, e.g., INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 190-91 (1991) (deferring to an agency construction of a regulation in part due to "the absence of any evidence" that the agency had applied the regulation in a manner consistent with the contrary construction).

Needless to say, it violates the most basic principles of administrative law for a federal court to reject an agency's interpretation of its own regulation in favor of one that is flatly inconsistent with both the regulation's plain text and longstanding agency practice. Consequently, in addition to all the other reasons supporting certiorari in this case, this Court's intervention is needed to correct the Fourth Circuit's manifestly erroneous understanding of basic principles of administrative law.

4. The decision below threatens to eviscerate not only the ability of employers and employees amicably to resolve their FMLA disputes, but also their ability

to utilize releases to capture mutual benefits in involuntary and voluntary separation programs. In so doing, the lower court's decision contravenes the settled policy of Congress and this Court favoring the private settlement of federal employment claims over resort to wasteful litigation, and violates fundamental principles of administrative law. Because the Fourth Circuit's erroneous holding imposes significant costs on the federal government, the judiciary, employers, and ultimately, the employees whom its rule is presumably intended to help, this Court's review is immediately warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

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PROGRESS ENERGY, INC.,
Petitioner,

v.

BARBARA TAYLOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief supports the petition for a writ of certiorari.[1]

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements.

All of EEAC's members are employers subject to the Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601 *et seq.*, as well as other labor and employment statutes and regulations. As employers who are potential defendants in FMLA and other employment-related lawsuits, EEAC's members have a direct interest in preserving effective, voluntary means of resolving both actual and potential claims without the costs, risks, and other burdens associated with litigation. The uncertainty that now exists in the courts of appeals jeopardizes that interest by making it impossible for a party to know whether or not a general release is enforceable without litigation. Because of its significant experience in these matters, EEAC is uniquely qualified to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Barbara Taylor worked for Carolina Power & Light Company, a subsidiary of Progress Energy, from 1993 until 2001, when she was terminated as part of

a reduction in force. Pet. App. 45a-46a. Upon her discharge, in exchange for a transition pay severance benefit of $11,718, Taylor signed a "General Release and Severance Agreement" waiving all employment-related claims, including those arising under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq.*, based on incidents that occurred up to the date of the agreement. *Id.* at 52a.

In 2003, Taylor filed an action in the U.S. District Court for the Eastern District of North Carolina at Wilmington, claiming the company violated the FMLA by failing to fully advise her of her rights, denying her FMLA leave, and terminating her in retaliation for complaining about alleged FMLA violations. *Id.* Progress Energy moved for summary judgment, contending that the release Taylor signed in 2001 was valid and a complete defense to the action. *Id.* at 22a. Taylor responded by arguing that Section 825.220(d) of the FMLA regulations—which provides "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under the FMLA"—rendered the release invalid as to her FMLA claims. *Id.* at 53a.

The district court granted Progress Energy's motion for summary judgment, holding that Section 825.220(d) did not render the release unenforceable. *Id.* at 58a, 63a. Relying on the Fifth Circuit's ruling in *Faris v. Williams WPC-I, Inc.*, it concluded that Section 825.220(d) applied only to waivers of prospective, or future, FMLA substantive rights, not claims for an alleged past violation of those rights. *Id.* at 58a.

On appeal, a three-judge panel of the Fourth Circuit reversed the decision, concluding that the regulation was intended to prohibit both retro-

spective and prospective waivers of FMLA rights. *Id.* at 22a. Progress Energy petitioned for panel rehearing, and the Secretary of Labor filed an *amicus* brief in support of the petition, disagreeing with the Fourth Circuit's interpretation of the regulation. *Id.* at 3a. The court granted panel rehearing and asked the Department of Labor to brief the issue. *Id.* The panel, divided after rehearing, reinstated its decision, ignoring both the Fifth Circuit's decision in *Faris* and the Department of Labor's position that the regulation does not require supervision and bars only prospective waivers. *Id.* Progress Energy petitioned the court for rehearing *en banc,* which was denied. *Id.* at 67a. It filed the instant Petition for a Writ of Certiorari on October 22, 2007.

SUMMARY OF REASONS FOR GRANTING THE WRIT

A divided Fourth Circuit panel ruled that FMLA waivers are not enforceable unless executed under supervision of the Department of Labor or the federal courts. Pet. App. 3a. The ruling is inconsistent with the position taken by the Department of Labor and by the Fifth Circuit that FMLA claims can be waived. *See* Brief for the Secretary of Labor as *Amicus Curiae* at 4; Supplemental Brief on Panel Rehearing for the Secretary of Labor as *Amicus Curiae* at 4; *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). The decision below imposes an unwarranted supervision requirement that adds a significant obstacle to future settlement of employment-related claims, which would be disadvantageous to employers and employees alike. Requiring supervision of FMLA waivers would mean that all general releases that include an FMLA waiver—regardless of whether the underlying dispute involves an FMLA claim—would

have to be supervised by a court or the Department of Labor, or else risk eliminating the incentive to settle employment-related claims in return for a general release. In addition, the decision calls into question the validity of general releases that *already* have been signed by potentially thousands of employees.

Furthermore, because the panel majority's decision conflicts with the Fifth Circuit's ruling in *Faris,* there now exists a conflict in the courts which, if not resolved by this Court, will cause significant confusion for multi-state employers seeking to implement uniform and consistent practices for the resolution of employment-related disputes. Having varying employment practices across the country impacts a company's smooth operations and creates confusion for employees. The financial impact on employers and employees is incalculable.

The Fourth Circuit's decision also is not mandated by law. The panel majority below placed too much emphasis on the similarities between the FMLA and the Fair Labor Standards Act to conclude that waivers under the FMLA are not permitted without Department of Labor or federal court supervision, while ignoring the significant differences between the two laws.

Under the rule announced by the panel majority below, any employee—even after signing a waiver and, in exchange, accepting significant remuneration —could retain the money already received under the severance program or settlement agreement and still sue his or her employer, as precisely was the case here. Without definitive guidance from this Court, employers will be much less likely to enter into financial settlement agreements or severance arrangements with employees whose promises not to

sue would not ultimately guarantee final resolution of the matter.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW OF THE DECISION BELOW TO RESOLVE THE IMPORTANT QUESTION OF WHETHER THE DEPARTMENT OF LABOR REGULATION AT 29 C.F.R. § 825.220(d) PRECLUDES THE PRIVATE SETTLEMENT OR RELEASE OF CLAIMS UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993, 29 U.S.C. §§ 2601 *ET SEQ.*

A. The Decision Below Disregards The Importance Of Private Resolution Of Actual And Potential Employment Disputes And Would Impose A Severe Hardship On Both Employers And Employees

Workplace layoffs and terminations occur and will continue to occur. According to the most recent U.S. Department of Labor, Bureau of Labor Statistics Mass Layoff report, for the last quarter of 2006, there were 1,640 "extended mass layoffs," defined as layoffs affecting 50 or more workers for at least 31 days, impacting at least 330,848 employees.[2] In September 2007 alone, there were 1,271 "mass layoffs", defined as layoffs of 50 or more workers from a single employer, impacting at least 123,656 employees.[3]

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[2] U.S. Dep't of Labor, Bureau of Labor Statistics, *News: Mass Layoffs in September 2007*, Table 4 (Oct. 23, 2007), *available at* http://www.bls.gov/news.release/pdf/mmls.pdf.

[3] *Id.* at 1.

Faced with the reality of workforce reductions, many employers offer severance benefits to ease an employee's transition to unemployment. Some employers, depending on financial circumstances and other considerations, also offer early retirement incentives and other voluntary programs in these situations. It is not uncommon for employees to sign general releases of claims against their employers in exchange for these separation benefits. *See International Bhd. of Elec. Workers, Local 1992 v. Okonite Co.*, 189 F.3d 339, 348 (3d Cir. 1999) (Rosenn, J., dissenting) (discussing history of severance packages and releases of claims in context of WARN Act waivers).

The panel majority decision below will have a tremendous impact on the practice of granting voluntary separation incentives and involuntary separation severance pay programs to employees. By ruling that these releases are unenforceable without Department of Labor or court supervision with respect to FMLA claims and removing the security they provide against future litigation, the Fourth Circuit has created a huge disincentive for employers to offer separation benefits.

The impact of the decision below—namely, the hesitancy to offer severance packages without a full release—will likely be absorbed by the employees who would have benefitted from these separation benefits. No longer will individuals faced with unemployment receive the financial safety net that these enhanced benefits provide. Most employees participating in these arrangements have no reason to believe their termination is unlawful and willingly sign a release as consideration for some peace of mind and financial security during their employment

transition. This financial safety net now has been placed in jeopardy as a result of the decision below.

B. The Decision Below Would Require Employers To Utilize Different Policies In Different Jurisdictions Creating Obstacles To The Private Settlement of Employment-Related Disputes

The panel majority decision below is in direct conflict with the Department of Labor's interpretation of its regulation and with the Fifth Circuit's 2003 decision in *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). In *Faris*, the Fifth Circuit held that Section 825.220(d) does not bar an individual from voluntarily waiving his or her FMLA claims, observing that the FMLA is similar to other employment discrimination statutes like Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, both of which allow for unsupervised releases of accrued claims. 332 F.3d at 321.

As a practical matter, the conflict created by the panel majority's decision below means employers will be required to implement different settlement practices and severance programs depending on the jurisdiction in which they are doing business. As the Fifth Circuit noted in *Faris*, there is a strong public policy in allowing waivers and favoring the private resolution of employment disputes. *Id.* at 321-22; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The inevitable consequence of the decision below, however, is that more actions will be filed in federal courts.

Not only are future releases and settlements affected, but the panel majority decision below also casts a shadow of uncertainty over the potentially thousands of waivers that have already been signed nationwide. Employers who believed they had obtained valid releases from employees now find that a general release is only partially enforceable in the Fourth Circuit. For these employers, this uncertainty undermines the finality of a release they reasonably believed to be valid and for which they paid substantial consideration.

The decision below jeopardizes the ability of parties to informally settle any employment-related disputes and will affect the value of those settlements. Employers will be reluctant to offer reasonable settlement amounts if they believe that the accompanying releases will be unenforceable as to potential FMLA claims. The Court therefore should grant certiorari to provide much-needed clarity regarding this issue.

C. Barring Waivers And Requiring Supervision For Waivers Is Not Mandated By Statute Or Regulation

The panel majority below held that because the FMLA's remedial scheme closely resembles that of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, whose enforcement provisions authorize (but do not compel) the Department of Labor to "supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee . . . ," 29 U.S.C. § 216(c), the same standard should apply equally to FMLA claims. Unlike the FLSA, however, neither the FMLA nor its implementing regulations speak to supervision of

claim waivers. In addition, the FMLA and FLSA serve different purposes.

The FLSA was enacted "to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945) (footnote omitted). As this Court observed in *Brooklyn Savings Bank v. O'Neil*, allowing employees to waive their substantive rights to a minimum wage or overtime compensation would run contrary to the purposes of the Act. *Id.* at 707. Accordingly, the Court would not allow employees to waive their rights under the FLSA when the fact of the employer's violation and the extent of its liability were uncontested, because to do so would, in effect, give judicial sanction to employment contracts that violated the statute.

In contrast to the FLSA, the purpose of the FMLA was not to set minimum terms or conditions of employment, but rather "to balance the demands of the workplace with the needs of families . . . in a manner that accommodates the legitimate interests of employers . . . ." 29 U.S.C. § 2601(b). FMLA actions, like those brought under other federal laws such as Title VII and the ADEA, typically involve issues of fact and law not resolved by the statute, and resolution of those issues may require extensive discovery and litigation. Perhaps to short-circuit these inherent delays, Congress gave private individuals the right to pursue—and to resolve—their own claims under the FMLA, without court or Department supervision. Given these important distinctions between the two laws, it was error for the panel majority to rely on the FLSA's permissive,

statutory waiver supervision provisions in imposing such a requirement on waivers of FMLA claims.

Supervision adds a layer of review that is yet another disincentive to settlement of employment-related claims. There are numerous reasons for parties involved in a dispute to settle claims without litigation, including the ability to come to a resolution in a timely manner, less cost for the parties, and keeping issues private. Exposing to supervision any agreement that includes a release of FMLA claims, regardless of whether the underlying dispute involves an FMLA issue, defeats the purpose of settling an employment claim. Employers want to know that a settlement constitutes a final resolution of a dispute and that they will not be subject to further lawsuits filed by the same party. Without a full release, this cannot happen.

In addition, supervision of any situation involving a release doubtlessly will lead to a delay in processing by the Department of Labor or a court, which likewise will delay receipt of financial benefits. The resulting potential impact on employees is significant—receiving separation benefits or a financial settlement in a timely manner could mean the difference between a smooth transition to another job and financial hardship.

Furthermore, what might have been an acceptable agreement between two private parties now would be open to scrutiny on many levels. Supervision means that the terms to which the parties agreed would be open to changes by an uninvolved third party. Employers may have to defend every settlement involving a general release of claims, either legally or in the court of public opinion, no matter what the dispute.

Once filed in court, the settlements would become public documents, open to anyone who may have an interest in exploring their contents, including disgruntled former employees looking to file frivolous litigation. Both parties to private settlements believe them to be just that—private. Subjecting private settlements to Department of Labor or court supervision creates a disincentive for employers to agree to settlements as they may be accused of wrongdoing when the facts may not bear it out, again thrust into a situation of defending themselves needlessly. It creates a similar disincentive for employees who want to keep matters private. Settling claims before litigation keeps facts, such as those regarding an employee's medical leave or termination, out of the public domain.

Moreover, there currently is no workable mechanism in place for supervision of FMLA releases. The Secretary of Labor confirmed this to the court below. *See* Brief for the Secretary of Labor as *Amicus Curiae* at 14; Supplemental Brief on Panel Rehearing for the Secretary of Labor as *Amicus Curiae* at 4. Thus, it is not at all clear how an employer and employee who are exchanging a general release for an early retirement incentive, for example, would go about obtaining court or Department of Labor approval, or how the courts would have jurisdiction over such a situation where there is no dispute. Filing an FMLA lawsuit just to obtain a consent decree with respect to every general release of claims is simply not a reasonable option for anyone, including the federal courts.

It is critically important to both employers and employees that the Court provide much needed clarity regarding whether FMLA claims can be

waived. Given the uncertainty created by the panel majority decision below, and the potential impact on employers and employees alike, it is imperative that this question be resolved.

While it is conceivable that the Department of Labor could exercise its rulemaking authority to clarify that unsupervised waivers are permitted under the FMLA, that process could take several months, if not years.[4] Because of the significant impact the decision likely already has had on the use of waivers in the employment context, this Court should resolve the question presented in this matter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] In 2002, this Court held in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 84 (2002), that the Department of Labor regulation at 29 C.F.R. § 825.700(a) was invalid. The Department of Labor has yet to redraft the language of that regulation five years later.

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PROGRESS ENERGY, INC.,

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v.

BARBARA TAYLOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* NORTH CAROLINA RETAIL MERCHANTS ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The North Carolina Retail Merchants Association (NCRMA) moves the Court, pursuant to S. Ct. R. 37.2, for leave to file a brief as amicus curiae in support of the petition by Progress Energy, Inc. (Petitioner) for writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

As set forth in more detail under Interest of Amicus Curiae in the attached brief, NCRMA is a non-profit trade association whose membership includes more than 25,000 retail stores across the State of North Carolina. Many of its members are covered by the FMLA and have an immediate and direct interest in the issue before the Court. Petitioner has consented to the filing of this brief. Respondent has not returned voice mail messages left for her counsel on November 16 and 19, 2007, and has therefore not granted her consent, necessitating this motion.

NCRMA's brief will assist the Court in determining whether to grant certiorari because it will (1) explain some of the severe practical consequences of the Fourth Circuit's approach if left intact; and (2) invite the Court to revisit its prior FLSA decisions with respect to waiver of claims, older decisions on which the Fourth Circuit relied but which the Court should now re-examine in light of changing relationships between employees and employers in the contemporary workplace.

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INTEREST OF AMICUS CURIAE[1]

The North Carolina Retail Merchants Association (NCRMA) is a non-profit trade association organized in 1902 to improve the business climate for retail merchants in North Carolina. Today, NCRMA serves as the voice of the retail industry in North Carolina. NCRMA represents the interests of individual merchants before the members of the North Carolina General Assembly and functions as a vital link to state government. Its credibility lies in its longevity, and its commitment to continuing to serve its members' ever-changing needs.

The NCRMA's membership includes more than 25,000 stores from across the State of North Carolina, businesses representing seventy-five percent of North Carolina's retail sales volume. NCRMA serves both large and small retailers from multi-state chains to locally owned retail outlets, and all types of merchants, including antique, apparel, art, automotive, book, carpet, department, drug, electronics, floral, furniture, grocery, hardware, jewelry, paint and variety stores.

NCRMA is a tax-exempt organization supported entirely by members' dues and governed by a forty-four-member board of directors. Board members represent

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1. The Petitioner has consented to the filing of this brief. Respondent has not responded to telephone messages requesting permission to file this brief. *Amici* has thus moved for the Court's permission to file it. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission.

the wide variety of retailers who do business in North Carolina. They are also selected to represent the different geographic areas of the state with representation in every county in the state.

Many of NCRMA's members are employers covered by the Family and Medical Leave Act ("FMLA") of 1993, 29 U.S.C. §§ 2601 *et seq.*, and by other labor and employment statutes and regulations. As employers and representatives of employers who are potential defendants in FMLA and other employment-related lawsuits, the *amici's* members have a significant interest in preserving effective, knowing and voluntary means of resolving both actual and potential claims without the costs, risks, and other burdens associated with federal administrative proceedings and litigation. NCRMA's members therefore have an immediate and direct interest in the issue before this Court.

REASONS FOR GRANTING THE PETITION

I. Introduction

In a split decision,[2] two members of the Fourth Circuit's panel below held that under a Department of Labor (DOL) regulation, 29 C.F.R. § 825.220(d), employees and employers cannot settle FMLA claims retrospectively, specifically, that they cannot for consideration enter into a knowing and voluntary release of any actual or potential claims of past FMLA violations, without a court or the DOL intervening.

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2. *Taylor v Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007).

This holding relies on older FLSA precedent which the Court should now revisit.

Further, the Fourth Circuit's holding directly conflicts with that of other federal courts' well-reasoned decisions.[3] Moreover, it rejects the DOL's interpretation of its own regulation.[4]

The existing conflict places employees as well as employers on the horns of a legal and practical dilemma, especially in situations where both parties desire an amicable end to the employment relationship. This Court needs to resolve this conflict among the federal courts as well as with the federal agency charged with enforcing FMLA, and to dispel the unnecessary complexity and uncertainty that the Fourth Circuit panel has injected into employer-employee relations.

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3. *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003); *Dougherty v. TEVA Pharms. USA, Inc.*, Civ. Action 05-2336, 2007 U.S. Dist. LEXIS 27200, 12 Wage & Hour Cas. 2d (BNA) 1252 (E.D. April 9, 2007); *see also* decisions that do not address the DOL regulation explicitly but reach the result urged here, *e.g.*, *Halvorson v. Boy Scouts of Am.*, No. 99-5021, 2000 U.S. App. LEXIS 9648 (6th Cir. May 3, 2000); *Schoenwald v. ARCO Alaska, Inc.*, No. 98-35195, 1999 U.S. App. LEXIS 20955 (9th Cir. August 30, 1999). The dissenting member of the Fourth Circuit panel below, Judge Duncan, would have followed this Court's admonition by deferring to the DOL's interpretation of its own regulation. *Taylor*, 493 F.3d at 463-464, citing, *inter alia*, *Auer v. Robbins*, 519 U.S. 452 (1997) and *Long Island Care at Home, Ltd. v. Coke*, __ U.S. __, 127 S. Ct. 2339 (2007).

4. *See* DOL, C.A. Amicus Brief 1-15.

II. The Court Should Reconsider FLSA Precedent Regarding Retrospective Waiver.

This case offers the Court an opportunity to revisit two of its Fair Labor Standards Act (FLSA) decisions which the Fourth Circuit cited and relied upon at 493 F.3d 457-460, *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945) and *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981). For reasons discussed elsewhere, decisions under Title VII and the ADEA (rulings which acknowledge that retrospective waivers of employment claims *are* permitted under those statutes) present a more apt analogy to FMLA cases than do FLSA cases. But the Fourth Circuit's underlying reliance on FLSA precedent, however misplaced, presents this issue for this Court's consideration.[5]

In *Brooklyn Sav. Bank* this Court held that an employee's claim for liquidated damages for past FLSA violations is a statutory right that parties to a settlement agreement cannot waive. The Court conceded that

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5. Lower federal courts have already declared superseded or have called into question the ongoing vitality of various aspects of *Brooklyn Sav. Bank* and *Barrentine*. *See, e.g., Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996); *Sneed v. Sneed's Shipbuilding, Inc.*, 545 F.2d 537, 539 (5th Cir. 1977); *O'Connor v. United States*, 50 Fed. Cl. 285, 294 (2001), *aff'd in part, rev'd in part*, 308 F.3d 1233 (Fed. Cir. 2002); *Walker v. Countrywide Credit Ind.*, Civ. Action No. 3:03-CV-0684-N, 2004 U.S. Dist. LEXIS 30477 at * 13-16 (N.D. Tex. January 15, 2004); *Albertson's Inc. v. United Food & Comm'l Workers*, Civ. No. 96-0398-S-BLW, 1997 U.S. Dist. LEXIS 4554 at *27 and *36-38 (March 10, 1997), *aff'd*, 157 F.3d 758 (9th Cir. 1998), *cert. denied*, 528 U.S. 809 (1999); *Torreblanca v. Nass Foods, Inc.*, No. F 78-163, 1980 U.S. Dist. LEXIS 13893 at *7 (N.D. Ind. February 25, 1980).

"[n]either the statutory language, the legislative reports nor the debates indicates that the question at issue was specifically considered and resolved by Congress." *Id.*, 324 U.S. at 705-706. From that legislative silence, however, the Court drew the lesson that "[i]n the absence of evidence of specific Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind this provision as evidenced by its legislative history and the provisions in and structure of the Act." *Id.* at 706. The Court concluded, "Such consideration clearly shows that Congress did not intend that an employee should be allowed to waive his right to liquidated damages." *Id.*

The dissenting Justices in *Brooklyn Sav. Bank* bluntly disagreed: "We find nothing in the Fair Labor Standards Act to prevent the effective operation of such a release upon the cause of action for liquidated damages more than any other." *Id.*, 324 U.S. at 716.

In *Barrentine* the Court also considered the relationship between statutory rights and private parties' contracting rights in the FLSA context. Specifically, the majority held in *Barrentine* that employees' FLSA action for unpaid time was not barred by the prior, unsuccessful submission of their wage claim to a joint employer-union grievance committee. The Court reasoned that the FLSA rights in question were independent of the collective bargaining process insofar as they devolved upon the employees as individual workers rather than as members of a collective organization.

Once again the majority's view drew vigorous dissent. The two dissenting Justices in *Barrentine*, Chief Justice Burger and then-Associate Justice Rehnquist, noted that the wage dispute in question fell well within the scope of countless work contracts around the country. *Barrentine*, 450 U.S. at 746-752. The dissenters observed that the majority's holding amounted to "ignoring the objective of Congress, the agreement of the parties, and the common sense of the situation." *Id.* at 746. They noted that the majority's decision "moves toward making federal courts small claims courts contrary to the constitutional concept of these courts having special and limited jurisdiction." *Id.*

The reasoning of the dissenting Justices in *Brooklyn Sav. Bank* and *Barrentine* holds even truer in the context of today's workplace realities. In times past, relationships between employers and employees tended to be characterized by starkly unequal bargaining power. This fact of life propelled the courts to reach out as the sole or primary protectors of employees' rights, and to create rules in the absence of Congressional action.

Today, by contrast, a great many federal statutes extend rights to employees, and (as in this case) those statutes typically invest federal administrative agencies with investigatory and enforcement authority, in addition to the power to promulgate regulations. Moreover, employees today tend to be more attuned to their legal rights, and these same employment statutes usually give employees access to agencies as well as courts for redress of grievances. Generally aware of such rights and mechanisms, employees often take advantage of their right to consult legal counsel before signing

settlement agreements, releases, or any other contracts affecting their rights.

Given these realities of the modern workplace, an employee should be able, without agency or court supervision, to waive claims retrospectively — whether claims under Title VII, FLSA, ADEA, or FMLA — absent an express Congressional ban on waiver, as long as the waiver is knowing and voluntary. Especially should this be true where the employee is represented by counsel.

The Court performed a similar analysis in an analogous setting, the question of whether parties could use a mutually-agreed-upon private resolution mechanism (in that instance, arbitration) to resolve employees' claims of statutory violations. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court unanimously held that Article III judges and representative juries were uniquely suited to, and protective of, workers' statutory civil rights. The Court held that the arbitral process—less formal, with limited discovery, and focused on contractual rights rather than public rights—was not suited for that purpose. But a decade later, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) the Court had come to the view that the arbitral forum was presumptively competent to resolve certain statutory claims of this nature, as long as there had been a valid agreement to arbitrate and the statute did not preclude arbitration.

In its later opinion the Court recognized that the law must respond to changing times and circumstances, noting that "we are well past the time when judicial

suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-627.

Similarly, the Court should take into account changing circumstances since its earlier rulings with respect to private resolution of pre-existing FLSA claims. If in this modern era competent parties wish to agree to resolve their actual or potential differences for the exchange of valuable consideration, absent a legislative or constitutional ban they should be allowed to do so.

Additional practical considerations, discussed below, reinforce these conclusions.

III. Other Practical Considerations Also Dictate Review.

As all agree, in enacting the FMLA, Congress was silent on the point at issue here. It left such matters to the discretion of the DOL, the agency to which Congress granted investigatory and enforcement authority, 29 U.S.C. §§ 2616, 2617, and which Congress empowered to promulgate regulations necessary to carry out the Act. 29 U.S.C. § 2654. Essentially ignoring both Congress and the DOL, in its ruling below the Fourth Circuit has engrafted its own rules onto the statute. The Fourth Circuit's unwarranted foray into agency rulemaking, if left intact, would give rise to many serious practical problems.

Literally tens of thousands of employers routinely provide terminated employees with severance agreements, especially for employees whose positions have been eliminated through reductions in force, of which there have been large numbers in recent years.[6] Such severance agreements typically include cash consideration for the employee, along with other benefits, in exchange for which the employee agrees to release any actual or potential claims against the employer.[7] Indeed, the release at issue in this case contains these common elements.

A signal advantage of such agreements for employers, as well as for departing employees, is that they provide security. Employees receive the security of compensation and benefits to which they would not otherwise be entitled. This support helps individuals in those situations bridge the gap from one job to the next. In turn it often relieves, at least partly, the public sector from having to expend taxpayer money for this purpose. For their part, employers receive the security of diminished prospects for future litigation, and a concomitantly greater ability to formulate reliable business plans and budgets. In short, for employer and

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6. *Local Union No. 1992 of the Int'l Bhd of Elec. Workers v Okonite Co.*, 189 F.3d 339, 348 (3d Cir. 1999) (Rosenn, J., dissenting); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 Mich. L. Rev. 867, 883 (March 2007).

7. David E. Nagle, *Fourth Circuit: Waiver of FMLA Rights Requires DOL or Court Approval*, 17 Va. Emp. L. Letter (Aug. 2005); David K. Haase & Emma Sullivan, *The Pitfalls of Releases*, Nat'l L. J. Oct. 23, 2006, at 16.

employee alike, it creates a clean break and a chance for a fresh start.[8]

These agreements also comport with oft-emphasized federal policy favoring the settlement of existing workplace disputes. *See, e.g., Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991); *Carson v. American Brands, Inc.*, 450 U.S. 79, 87 (1981) (noting that such agreements can help "avoid the costs and uncertainties of litigation"). Indeed, federal courts have themselves instituted programs for mediation or arbitration of matters in controversy before them. Even at the appellate stage, federal circuit courts of appeals have codified in their rules various formal procedures which encourage the amicable resolution of matters on appeal. If it is desirable privately to settle a controversy at the appellate stage, after the parties and courts have devoted substantial resources to its resolution, it follows that a much more desirable outcome would be to permit the parties themselves to reach an amicable and mutually satisfactory agreement at an early stage, before these additional expenses are incurred.

Similarly, public policy favors enforcement of waivers in the context of analogous employment claims. *Faris*, 332 F.3d at 321; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-29 (1991); *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 515-516 (1986); *Carson, supra.*

By contrast, the Fourth Circuit panel's approach discourages the private settlement of claims. An estimated seventy-six million American employees enjoy FMLA protection. 71 Fed. Reg. 69504, 69511 (Dec. 1, 2006). In 2005,

8. Carol Wong, *Note: The Family and Medical Leave Act: To Waive or Not to Waive*, 2007 U. Ill. L. Rev. 1567, 1579-80 (2007).

as many as thirteen million workers took leave for reasons covered by the FMLA. 71 Fed. Reg. 69511. If employers could not know for sure that they could achieve closure and avoid the trouble and expense of future FMLA litigation by entering into a settlement and release with a departing employee, they would be far less likely to offer the employee much if any consideration in return for the employee executing a release. Laid-off employees would thereby lose a significant benefit they now often enjoy.[9]

Retail merchants, such as those represented by the North Carolina Retail Merchants Association, suffer from high turnover. DOL Bureau of Labor Statistics (*http://www.bls.gov/oco/ocos121.htm*). Faced with such a situation, retail employers need a simple, inexpensive way to resolve issues with employees. The Fourth Circuit's decision fails to take these and other practical needs into account.[10]

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9. *See, e.g.*, Carol Wong, *supra*, 2007 U. Ill. L. Rev. at 1579-80; Womble Carlyle Sandridge & Rice, PLLC, *Court Makes It Hard to Settle FMLA Claims*, North Carolina Employment Law Letter (August 2005) (noting that the 4th Circuit's *Taylor* decision will make employers less willing to pay severance to laid-off employees); Ann Mennell, *4th Circuit Rules FMLA Waiver Invalid Without Court of DOL Approval*, Business and Management Practices (Aug. 16, 2005) ("This case is troubling in that it undermines the finality that an employer expects to receive in exchange for a severance payment." The author suggests employers may wish to offer less in severance pay due to this uncertainty.)

10. *See, e.g.*, Muniza Bawaney, *Signed General Releases May Be Worth Less than Employers Expected: Circuits Split on Whether Former Employee Can Sign Release, Reap Its Benefit, and Sue for FMLA Claim Anyway*, 82 Chicago-Kent Law Review 525 (2007) (endorsing the 5th Circuit's holding in

(Cont'd)

Beyond these problems, the Fourth Circuit's approach calls into question the validity of countless settlement agreements and releases to which employers and employees have agreed in the past, injecting further uncertainty into individual lives and into the commercial life of the nation.

In addition to the practical obstacles the Fourth Circuit's rule would create for employees and employers, the approval scheme which the Fourth Circuit envisions—one which, as stated, the court below created with no specific statutory basis, and over the opposition of the agency itself—would unduly burden the already over-burdened federal courts as well as the DOL.

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Faris and concluding that the 4th Circuit's Panel approach is "inconsistent," "troubling," "impractical," and "inefficient"); Earl M. Jones, III, Jason R. Dugas, and Jennifer A. Youpa, *Annual Survey of Texas Law: Employment Law*, 59 SMU L. Rev. 1211 (Summer 2006) (4th Circuit Panel's "startling" decision "takes away employers' security of knowing that a settlement is final and binding."); Jeffrey J. Kros, *Courts Split on FMLA Waivers*, Workspan (Oct. 1, 2005) (4th Circuit's "surprising" decision in conflict with other authorities "leaves many HR practitioners caught in the middle, wondering which way to go."); Whiteford, Taylor & Preston L.L.P., *Employers, Take Note: Your General Release May Not Be as Broad as You Think!* Maryland Employment Law Letter (September 2005) (4th Circuit has "thrown a monkey wrench" into the common practice of providing enhanced severance benefits to departing employees in exchange for a general waiver and release of claims); Judy Greenwald, *Decision Limiting FMLA Waivers Creates Employer Headaches*, Business Insurance (Aug. 8, 2005) (citing authorities that 4th Circuit decision creates a "land mine" for both employers and employees).

Potentially, many thousands of individual employers and individual employees, few having any justiciable controversy, would have to submit their private agreements to the DOL or the courts each year. Most if not all such cases would presumably require some level of detailed inquiry. Neither the agency nor the courts possess the necessary resources for dealing with such an onslaught of new matters, essentially creating controversies where none exist, without sacrificing other important aspects of their work.

Finally, rejection of the Fourth Circuit's rule would not leave employees without legal protection. An employee who waives his or her rights under inequitable circumstances still has a judicial remedy. Any waiver must be knowing and voluntary in order to be enforceable. In any situation where an employer uses unequal bargaining power to apply undue pressure on an employee to sign an agreement against his or her will or without adequate information, courts can and will step in.[11] This safety net for employees also serves as a prophylactic check on any abuses by employers. But in the vast majority of cases, where employers and employees properly agree to an amicable parting, they should be allowed to do so undisturbed.

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11. Employees who qualify for coverage under the Older Workers Benefit Protection Act (OWBPA)—millions of workers who are at least 40 years old—receive the added protection of that statute's requirement that any waiver under the ADEA be knowing and voluntary. The OWBPA sets eight minimum requirements for a release to meet this standard. 29 U.S.C. § 626(f)(1)

CONCLUSION

Congress enacted the FMLA in part to balance workplace demands and family needs "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(1), (3). The Fourth Circuit's rule defeats those purposes. This Court should grant the petition to address this issue, as well as to address the issue of the continuing vitality of prior decisions relating to waiver in the FLSA context.

Respectfully submitted,

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IN THE

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PROGRESS ENERGY, INC.,

Petitioner,

v.

BARBARA TAYLOR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND THE COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae Society for Human Resource Management (SHRM) and the College and University Professional Association for Human Resources (CUPA-HR) are the Nation's preeminent organizations representing human resource professionals in the private and public sector and with institutions of higher learning, respectively.

Amicus SHRM is the world's largest association devoted to human resource (HR) management. SHRM represents more than 225,000 individual members in more than 550 affiliated chapters across the United States, as well as in more than 125 other countries. Founded in 1948, SHRM's mission is to serve its members' needs by providing them the most essential and comprehensive HR resources available, and to advance the HR profession to ensure that it is recognized as an essential partner in developing and executing organizational strategy.

Amicus CUPA-HR serves as the voice of human resources in higher education, representing nearly 10,000 HR professionals at 1,600 colleges and universities across the country, including 85 percent of

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief, and the parties consented to its filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

all U.S. doctoral institutions, 75 percent of all master's institutions, more than half of all bachelor's institutions and 465 community colleges. Higher education employs 3.3 million workers nationwide, in every State in the country.

Both *amici* count among their members HR professionals in all 50 States. Many administer human resource issues for employers covered by the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et. seq* (FMLA), administering leave policies under the Act and its regulations and making sure their employers are in compliance. As representatives of employers who are potential defendants in FMLA and other employment-related litigation – and as potential defendants themselves – the members of *amici* are keenly interested in preserving effective, voluntary means of resolving such claims without the costs, risks and other burdens associated with litigation.

These members and their employers now are presented with a dilemma as to how to obtain effective releases of FMLA claims. Under practices that date to the FMLA's enactment in 1993, most if not all have been obtaining FMLA releases as part of routine general contractual release agreements entered into with departing employees, without any intervention by, or involvement of, the Department of Labor or the Federal courts. Under the Fourth Circuit's ruling that 29 C.F.R. 825.220(d) precludes the private settlement or release of FMLA claims, however, that practice is now called into serious question nationwide.

Additionally, some of the members of *amicus* SHRM are HR professionals whose employers have operations in *both* the Fourth and Fifth circuits. For those HR professionals, their company's operations in the five States of the Fourth Circuit now cannot invoke an FMLA release obtained in a private agreement to forestall or defeat an FMLA lawsuit, while the same company in the States of the Fifth Circuit (and elsewhere) may continue to obtain such releases, albeit at peril of having them later ruled invalid. This is the antithesis of nationwide uniformity that the FMLA was designed to foster.

Lastly, many members of *amici* have a direct personal interest in the issue presented in the Petition, since the FMLA imposes individual liability upon private-sector supervisors for violating an employee's FMLA rights. 29 U.S.C. § 2611(4)(A)(ii)(I); 29 C.F.R. 825.104(d).

The members of *amici* SHRM and CUPA-HR have a strong and direct interest in seeing the circuit conflict on this issue resolved now, not at some uncertain future point.

SUMMARY OF ARGUMENT

Employers make extensive use of general releases as part of the employment separation process, yet the Fourth Circuit's unprecedented holding – interpreting 29 C.F.R. § 825.220(d) to bar employees from ever waiving an FMLA claim without supervision by the DOL or a court – casts tremendous uncertainty over their continued ability to do so. It makes it virtually impossible for employers to obtain an enforceable

general release that includes FMLA claims with any degree of confidence, absent litigation or DOL involvement, and introduces great uncertainty into HR practices nationwide.

Given the significant burdens already imposed on employers by the FMLA, and the importance that HR professionals, employers and employees place on private general releases, the Court should grant the Petition and remove this uncertainty by resolving the conflict among the circuits.

REASONS FOR GRANTING THE WRIT

I. The Conflict Among the Circuits On this Issue Creates Significant Uncertainty for Employers and Their Human Resource Staffs.

The FMLA was enacted in 1993 with the laudable goal of allowing workers to balance family and work obligations in a manner that would not prove unduly burdensome to employers. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002), *citing* H.R. Rep. No. 102-135, pt. 1, p. 37 (1991). Congress expressly included among its findings and purposes, its desire "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote *national* interests in preserving family integrity." 29 U.S.C. § 2601(b)(1) (emphasis added).

Congress deemed the imposition of a uniform nationwide leave obligation to be critical, because it permitted employers to provide benefits for employees without putting any at a competitive disadvantage.

"Uniform standards like the FMLA help all businesses maintain a minimum floor of protection for their employees without jeopardizing or decreasing their competitiveness." S. Rep. No. 103-3, p. 18 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 20. Thus, it is clear that Congress intended not only to strike a balance between employer and employee rights, but also to do so in a nationally uniform manner.

The conflict between the circuits on the validity of private releases undermines that goal of national uniformity of FMLA obligations, and casts great uncertainty upon this aspect of employer-employee relations.

A. Uncertainty In the Area of FMLA Releases Will Increase the Already Significant Burdens the Act Places Upon Employers.

To reduce the risks and costs of potential litigation, employers frequently enter into severance agreements with departing employees that include a general release of claims. Such agreements typically offer severance benefits to employees in exchange for a release of "any and all" claims. Carol Wong, Note, *The Family and Medical Leave Act: To Waive, Or Not to Waive*, 2007 U. Ill. L. Rev. 1567, 1579, *citing* David K. Haase & Emma Sullivan, *The Pitfalls of Releases*, National Law Journal, October 23, 2006, p. 16, *available at* http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C1449%5CNLJHaase_Sullivan_Article.pdf. But the Fourth Circuit's ruling and resulting conflict among the circuits has introduced a high degree of uncertainty into this area, throwing employment-law practitioners

"into a state of confusion about what to advise their clients," Wong, *Id.* at 1580 – many of whom are HR professionals and members of *amici*.

The FMLA is far-reaching in scope, as Congress intended it to be. The Department of Labor (DOL) estimates that 94.4 million individuals worked at FMLA-covered worksites as of 2005, the most recent figures available. U.S. Department of Labor, *Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information; Proposed Rule*, 72 Fed. Reg. 35550, 35622 (June 28, 2007). Of those individuals, 76.1 million were eligible for FMLA leave. *Id.* In other words, more than half of the nation's 141.7 million-member workforce is covered by the Act and its regulations, and each of those individuals during his or her employment becomes a potential holder of one or more claims under the FMLA. By various estimates cited by the DOL, at least 2.4 million workers, and perhaps as many as 13 million workers, actually took FMLA leave in 2005. 72 Fed. Reg. at 35622. Thus, it is with good reason that employers routinely seek to obtain releases of FMLA (and other) claims upon separation from employment.

As the nation's largest human resource organization, SHRM routinely conducts comprehensive surveys of its members on issues of significant and widespread interest to them. Earlier this year it conducted one such survey regarding the FMLA, with which employers have struggled since its enactment in 1993 – especially those provisions dealing with unscheduled leave for episodic or chronic serious health conditions, the definition of a "serious health condition" and the implications of intermittent leave.

FMLA and Its Impact on Organizations (SHRM, Alexandria, Va.), July 2007 (hereafter, "Survey Report"). The 2007 survey included responses from a randomly selected pool of 521 HR professionals, with a margin of error of plus or minus 4 points. SHRM's membership are especially well-suited to provide valuable insights and data on the topic: HR professionals are likely to be the person within their organization charged with implementing FMLA policies and procedures, and thus are typically the individual most knowledgeable regarding the Act's real-world impact on the organization. *Id*, p. 1.

Among the findings of the 2007 survey:

- The "vast majority" of HR professionals agree that there have been more requests for FMLA leave in the past five years, as compared to 10 years ago, across a variety of situations. *Id.*, p. 7. Types of leave with the greatest increases were those resulting from an employee's episodic condition (81 percent of respondents "strongly" or "somewhat" agree that such requests have increased in their organization the past five years), maternity, birth or adoption of a child (73 percent) and care for a parent with a serious health condition (72 percent). Survey Report, pp. 13-14.

- Overall, 95 percent of HR professionals reported at least one instance of FMLA leave in his or her organization in the preceding 12 months. *Id.*, p. 14.

- Among the most difficult compliance areas are tracking/administering intermittent FMLA leave (80 percent of HR professionals rate it either "somewhat difficult" or "very difficult"); determining overall FMLA compliance costs (79 percent) and determining whether an intermittent "serious health condition" is covered by the Act (73 percent). *Id.* at 20-21. Significantly, *63 percent of HR professionals rated the overall ease of complying with the FMLA "somewhat difficult" or "very difficult"* – up sharply from the 36-percent figure reported in a similar survey conducted in 2000 by Westat. *Id.* at 20-21.

- Confusion caused by "the sometimes contradictory and confusing aspects" of DOL information can cause uncertainties in administering FMLA leave policies. "In some cases, employers may perceive employee requests for FMLA leave as illegitimate but still feel the need to grant the leave, perhaps to avoid the possibility of litigation." Survey Report, p. 23.

- HR professionals in large organizations (500 or more employees) are more likely to experience challenges in administering/granting FMLA leave across most leave categories, and more likely than those in small organizations to indicate the business productivity, employee turnover and business growth were negatively

affected by the Act and its regulations. *Id.*, pp. 18-19, 29.

These results track closely with those of two SHRM polls taken in November 2006, regarding specific FMLA-related difficulties encountered by members' organizations. Survey Report, p. 18 & nn. 17, 18. Nearly three-fourths of participants (73 percent) reported challenges with tracking intermittent leave, while other widely identified problem areas included chronic abuse of intermittent leave (66 percent), morale problems among employees asked to cover for co-workers on leave (63 percent), costs associated with lost productivity due to absences (60 percent), and both vague documentation of "serious health conditions" by health-care professionals, and uncertainty about the legitimacy of leave requests for an employee's episodic condition (57 percent each). Survey Report, p. 18. Abuse of intermittent FMLA is an especially large and growing problem – entities who responded to the DOL's 2006 Request for Information regarding the FMLA noted a "menacing, intangible cost" of such abuse on co-workers who must cover shifts, and difficulties posed by those invoking such FMLA leave on or near a holiday after their request for time off has been denied. 72 Fed. Reg. at 35579-35580. Indeed, CCH's annual survey found that unscheduled absenteeism in 2006 climbed to its highest level since 1999. *Id.* at 35636, *citing* 2006 CCH Unscheduled Absence Survey, *available at* www.cch.com/press/news/2006/20061026h.asp.

In 2007 CUPA-HR also conducted a survey of members on the FMLA and found similar results. More than 85 percent of the 360 CUPA-HR members

who responded reported challenges with the definition of "serious health condition," more than 80 percent reported problems with tracking intermittent leave and close to 75 percent reported problems with notice of leave and unscheduled absences.

Thus, it is clear that HR professionals have struggled for some time, and continue to struggle, with aspects of the FMLA. Mixed signals regarding FMLA obligations do not help. SHRM's 2006 polls indicated that "some HR professionals have found the DOL regulations, guidance and opinion letters to be contradictory and confusing for various types of FMLA leave," and as a result, "it may not always be clear to employers what conditions qualify and under what circumstances they qualify as a serious health condition." Survey Report, p. 21. As one organization noted in response to the DOL's RFI regarding the FMLA regulations, "[w]ith the Act itself silent on the enforceability of waivers and the regulations containing a terse one-sentence prohibition, further guidance on the enforceability of waivers is needed." *Comments and Response to the U.S. Department of Labor's Request for Information on the Family and Medical Leave Act* (The National Coalition to Protect Family Leave), February 16, 2007, p. 38, *available at* http://www.protectfamilyleave.org/pdf/coalition_fmla_comments.pdf.

Against this backdrop, it is not surprising that employers have come to rely on the practice of including FMLA claims in the general releases they routinely obtain from employees upon separation from employment. *See generally*, Haase & Sullivan, *supra*. Such releases help employer and employee alike by

allowing them to tie up a wide variety of loose ends from the employment relationship: employees typically obtain money in exchange for giving a release, and employers gain certainty and predictability with regard to potential outstanding claims. But by adding FMLA claims to the short list of matters that cannot be waived in a general release – or more accurately, *will* not be waived, at least until the conflict between circuits is resolved – the Fourth Circuit ruling severely undermines that widespread practice.

Indeed, the conflict now created by the Fourth Circuit's ruling will translate directly into additional uncertainty for employers and members of *amici* nationwide. Already facing several chronic problem areas under the Act, and inclined to cave in and grant suspect leave requests rather than face possible litigation, employers and their HR staffs now face the added burden of not being able to "tie up the loose ends" on a departing employee's relationship with the company in a general release agreement. The already-daunting task of complying with the FMLA and its maze of regulations will be made even more so by the knowledge that any interpretive mistake, no matter how innocent, no longer may be rectified by purchasing a private FMLA release from the employee upon departure. Nor is there any consistency as to where that burden will be imposed: while employers and HR professionals in the States of the Fifth Circuit (for now) may continue to use such releases, based on the ruling in *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003), employers in the Fourth Circuit cannot – and those in the remaining 42 States simply don't know.

This Court has recognized that a conflict among the circuits in the interpretation of a workplace-related statute presents sufficient grounds for granting certiorari. *See, e.g., Mitchell v. H.B. Zachry Co.*, 362 U.S. 310, 313 (1960) (certiorari granted to resolve circuit conflict on issue of interpreting Fair Labor Standards Act). This has been the case even where the conflict is only between two circuits. *Federal Labor Relations Auth. v. Aberdeen Proving Grounds*, 485 U.S. 409, 472-473 (1988) (certiorari granted to resolve conflict between D.C. and Fourth circuits over interpretation of provision of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101 *et. seq.*). Because "uniformity among federal courts is important" on significant questions, this Court may grant certiorari to end the conflict of authority. *Thompson v. Keohane*, 516 U.S. 99, 106-107 (1995) (certiorari granted to resolve circuit conflict over construction of Federal habeas corpus statute, 28 U.S.C. § 2254(d)).

The FMLA is a statute of sweeping scope, with nearly 100 million employees working at FMLA-covered workplaces, and more than 76 million of those eligible for leave. In 2005, between 2.4 million and 13 million actually took FMLA leave, and an unknown additional number requested it but were denied. The current uncertainty into which the Fourth Circuit's ruling has plunged the law governing private releases of FMLA claims provides a compelling reason for this Court to grant certiorari.

B. Allowing the Circuit Conflict to Linger Could Result in Decreased Use of Employment Releases and Waivers, With Resulting Increases In Litigation and Costs Imposed On Employers and Employees Alike.

The uncertainty caused by the conflict between the Fourth and Fifth circuits also could slow, if not bring to a standstill, voluntary separation incentives and involuntary separation severance-pay programs. Large-scale reductions-in-force (RIFs) have become one of the defining characteristics of employment in the United States since the mid-1980s, and are now a "pervasive and permanent" part of the workplace. Frank A. Tola and Christopher K. Ramsey, *What Is An Employer To Do? Employment Termination, Severance and Waivers*, set forth in *Layoffs and Job Security Survey* (SHRM, Alexandria, Va.) 2001, pp. 64, 69, *available at* www.shrm.org/hrresources/whitepapers_published/CMS_000139.asp. Given the litigious nature of our society and the risk of runaway jury verdicts in RIF cases, the practice of employers offering a severance package has become widespread – according to a 2001 SHRM survey, 80 percent of recently laid-off employees received some form of severance package. *Layoffs and Job Security Survey*, *supra*, p. 15. The linchpin of the entire severance process is the valid waiver of claims that employees give to employers. Tola and Ramsey, p. 68.

The Fourth Circuit ruling jeopardizes the ability of employers and employees to voluntarily resolve FMLA and other claims. "[E]mployers may offer to settle for less or refuse to settle at all because parties often join

FMLA claims with other claims arising under other employment discrimination laws." Wong, *Id.* at 1579-1580. In some cases, employees may be able to collect severance pay and *still* be able to bring an FMLA claim regardless of how soundly the release is drafted. Haase and Sullivan, *supra*, p. 16. Given that, employers likely will offer employees less in severance than they otherwise would – because they are receiving a release from at least one less claim.

This is not insignificant, given the prevalence of severance programs – especially in the "mass layoff" situation, which the DOL defines as layoffs of 50 or more workers. Employers in the third quarter of 2007 undertook a total of 3,279 "mass layoff events," involving a total of 336,262 employees. U.S. Department of Labor, Bureau of Labor Statisics, *News: Mass Layoffs In September 2007* (October 23, 2007), *available at* http://www.bls.gov/news.release/archives/mmls_10232007.pdf. No doubt, many of those employees were offered severance agreements that included a general release of claims. The circuit conflict thus casts a veil of uncertainty over a widespread practice that, in all likelihood, is voluntarily engaged in by hundreds of thousands of employees – and their soon-to-be former employers – each year. The uncertainty engendered by the Fourth Circuit's ruling therefore has substantial consequences both for employers and employees.

Public policy favors the private settlement of employment disputes. *Faris*, 332 F.3d at 322 ("Our reading of the regulation is bolstered by public policy favoring the enforcement of waivers and our knowledge that similar waivers are allowed in other

regulatory contexts. Waivers of the right to bring suit under the Age Discrimination in Employment Act ("ADEA") are enforced by this court and are not void as against public policy.") Private release agreements perform both a socially and economically useful role, since they typically let the parties share between themselves costs that would otherwise be consumed in litigation. Keith N. Hylton, *Agreements to Waive or Arbitrate Legal Claims: An Economic Analysis*, 8 Sup. Ct. Econ. Rev. 209, 217-221 (2000). But the conflict among the circuits and resulting uncertainty threatens to undermine private resolution, and push even amicable employer-employee separations into the DOL or the Federal courts.

The Court should not wait until "more" of a circuit conflict develops before it settles this issue, but rather should grant the Petition and resolve it now. *Amici* fully support the policy goals of the FMLA, but the statute and its regulations already impose significant compliance issues and burdens on their members' employers. According to the Office of Advocacy of the U.S. Small Business Administration, while the DOL in 1995 estimated that the cost to business of the FMLA was $675 million annually, a more comprehensive 2004 survey done by the Employment Policy Foundation estimated – based on respondents' compliance costs – that compliance with the Act in 2004 directly cost employers *$21 billion* in terms of lost productivity due to absenteeism, continued health benefits and net replacement labor costs. 72 Fed. Reg. at 35629-35630.

As long as it exists, the circuit conflict will only increase compliance difficulties and undermine the

likelihood of employers and employees entering into voluntary agreements – because employers cannot rely on the enforceability of such agreements while the circuits disagree. For the sake of employers and employees alike, the conflict in the area of FMLA releases should be resolved now.

CONCLUSION

Amici curiae Society for Human Resource Management and the College and University Professional Association for Human Resources request that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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